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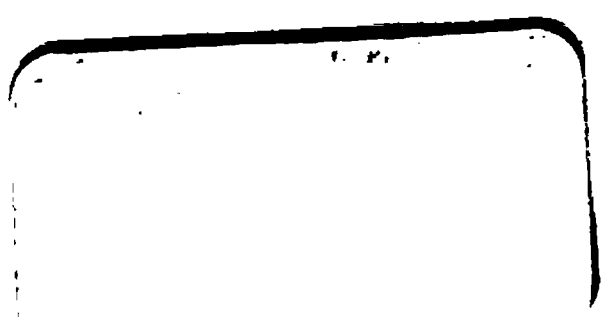
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THE LAW OF WASTE.

THE LAW OF WASTE.

A TREATISE ON THE RIGHTS AND LIABILITIES
WHICH ARISE FROM THE RELATIONSHIP OF LIMITED OWNERS
AND THE OWNERS OF THE INHERITANCE WITH
REFERENCE TO THE TENEMENTS.

BY

WYNDHAM ANSTIS BEWES, LL.B. (LOND.),

OF LINCOLN'S INN, BARRISTER-AT-LAW,

AUTHOR OF "COPYRIGHT AND PATENTS," ETC.

"I have been the more spacious concerning this learning of waste, for that
it is most necessary to be known of all men."—COKE UPON LITTLETON, 54 b.

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PREFACE.

THE fact that there is no practical book of modern times which deals at all exhaustively with the subject will be, it is hoped, a sufficient apology for my offering the present work to the profession and the public. It has heretofore been necessary to consult several text-books before being able to ascertain the law affecting the relationship of limited owner and reversioner or remainderman, apart from contract expressed or implied.

An investigation of the existing law convinces me that there are many points in which the law would be the better for alteration. Thus, it might reasonably be an obligation on a tenant without impeachment of waste, that if he cuts timber he should replant. There is no obligation to that effect even where a tenant for life cuts under the powers of the Settled Land Acts, though "planting" is one of the improvements authorised out of capital. A tenant in tail should probably be under the same obligation. At any rate, his guardian cutting during his infancy should be so bound, and so should the committee of a lunatic.*

At present, timber and minerals do not become the property of an unimpeachable tenant for life or tenant

* See an article in *Quarterly Review* for July.

in tail until severance, and the death of either, pending the execution of a contract, terminates the power of the purchaser to cut and carry away. It would seem reasonable to allow the purchaser power to complete the contract as against the inheritance, subject to the obligation of paying the remaindermen the price applicable to the chattels severed since the death, upon showing to the Court or trustees that the contract is such as would have been reasonable for a tenant for life to make under the Settled Land Acts. At present, by ss. 31, 58 of the Act of 1882, a tenant in tail and an unimpeachable life tenant can only contract, so as to bind the reversion, if they contract in the same way as an ordinary tenant for life, and resign to the capital of the estate a portion of the income to which they are strictly entitled.

It is to be regretted that the decisions of the Courts of Equity as to the liability of a tenant for life for permissive waste have not followed those of the Common Law, by which a lessee has been held liable for the results of permissive waste, *e.g.* for actual damage to premises through not keeping them wind and water-tight.

There seems to be no satisfactory reason for the divergence ; but perhaps the last has not been heard on this subject. At present, a tenant for life is in this peculiar position : he is not liable to repair, but he will not be allowed any portion of the capital of the estate to maintain the premises, and if he expends his own income he will not be recouped. At the termination of his tenancy, the dilapidations, if serious enough, would in many cases be a charge on the inheritance.

Lastly, the Lord Chancellor's bill for the limitation of actions in cases of tort (p. 395) would seem likely to have a pernicious effect as regards the law of waste, and will, if passed, prevent a reversioner suing for damages, unless the action is begun within one year of the waste committed. So that if a life tenant for years commits waste, to however great an extent, he will be unimpeachable after the lapse of a year unless he makes profit by the waste. In general, it is practically impossible to discover waste so early as one year after its commission, for reversioners often enough live far from the property affected; and yet with reasonable diligence (proviso in s. 1) the waste could be ascertained.*

I have had occasion to criticise several decisions in the course of this book, and among them *Murphy v. Daly* (p. 19); *Woodhouse v. Walker* (p. 219); *Davies v. D.*, pp. 218, 219; *In re Cartwright* (p. 222).

In some instances objection may be taken that I have given too much prominence to cases decided on the old statutory action of waste; but if this be a failing, my excuse is that a practitioner who has occasion to refer to the older law may require some assistance in avoiding the pitfalls incident to this very technical action and its forms of pleading. It has not, however, been practicable in all cases to ascertain whether decisions were in statutory actions or in actions on the case, as the reports are frequently obscure on this rather essential point.

I have endeavoured to note the effect of modern

* The bill passed the House of Lords, but was withdrawn in the House of Commons owing to pressure of other business.

legislation on the pre-existing law, and have given the more important statutes in the form of an Appendix. I have not thought it necessary or proper to convert this book into, in part, a treatise on the Settled Land Acts, &c.

In treating the cases I have adopted a modified form of digest, preferring to give, where possible, the actual words of the decisions; but in certain portions I have used a more abbreviated method as more suitable to the subject in hand.

A few American decisions of importance have been cited.

W. A. BEWES.

August, 1894.

Lincoln's Inn.

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ADDENDA ET CORRIGENDA.

Page 37, line 21. Insert "of. *Dalby v. Hirst* (1819), 1 Brod. & B. 237."

„ 49, „ 2. "Goodright" should be "Goodtitle."

„ 63, „ 26. For "8 Vesey 581," read "1 J. & W. 105."

„ 63, „ 27. For "1 J. & W. 105," read "8 Vesey 581."

„ 102. Dele last four lines as misleading in this connection.

„ 159, „ 20. Insert "S.C. on appeal, nom. *Ap Rice's Case* (1590), ib. 242."

„ 184. Dele "But" on third line from bottom.

„ 235, 325. *Nether Stowey Vicarage*, distinguished by North, J., in *Ex p. Commissioners of Sewers, &c.* (1894), W. N. 154.

„ 277, line 10. For "386," read "387."

„ 281, „ 11. Insert "See *In re X.* (1894), 2 Ch. 415."

„ 283, „ 8. For "387," read "388."

„ 286, „ 17. For "366," read "367."

„ 289, „ 10. For "Ambler" read "1 Anstruther."

„ 299, „ 27. Dele first "the."

„ 388, „ 14. Insert "See *In re Bagg* (1894), 2 Ch. 416 n."

THE LAW OF WASTE.

INTRODUCTORY.

THE OLD STATUTORY AND COMMON LAW REMEDIES.

By the old Common Law, apart from any statute, the three following persons were liable for w., since they held by operation of law and not by contract or quasi contract:—tenants in dower and by the curtesy, and guardians in chivalry. In 2 Inst. 300 Lord Coke says: “The tenant in dower and likewise the tenant by the curtesy had two punishments, viz., to yield damages to the value of the w., and a keeper or curate to be appointed to them, who should withstand any w. to be afterwards done by them. And the guardian had three punishments: 1. He should lose the custody. 2. He should yield damages to the value of the w.; and 3. He should be fined to the king, for that contrary to the trust in him reposed by reason of his guardianship, he did w. to the disherison of the heir, and this did hold as well in case of a guardian in droit, as a guardian in fait.” Also by the custom of the City of London an action at law lay for w. in houses. 2 Inst. 299.

The first statutory mention of the subject is in connection with the destruction of their wards’ estates by

guardians in chivalry, and occurs in No. 3 of the Articles of the Barons presented to King John in A.D. 1215, appearing in an amplified form as ss. 4-6 of the Great Charter:—

“S. 4. The keeper of the land of such an heir, being within age, shall not take of the lands of the heir, but reasonable issues, reasonable customs, and reasonable services, and that without destruction and w. of his men and his goods. And if we commit the custody of such land to the sheriff, or to any other, which is answerable unto us for the issues of the same land, and he make destruction or w. of those things that he hath in custody, we will take of him amends and recompence therefore, and the land shall be committed to two lawful and discreet men of that fee, which shall answer unto us for the issues of the same land, or unto him whom we will assign. And if we give or sell to any man the custody of any such land, and he therein do make destruction or w., he shall lose the same custody; and it shall be assigned to two lawful and discreet men of that fee, which also in like manner shall be answerable to us, as afore is said.

“S. 5. The keeper, so long as he hath the custody of the land of such an heir, shall keep up the houses, park, warrens, ponds, mills, and other things pertaining to the same land, with the issues of the said land; and he shall deliver to the heir, when he cometh to his full age, all his land stored with ploughs, and all other things, at the least as he received it. All these things shall be observed in the custodies of archbishoprics, bishoprics, abbeyes, priories, churches, and dignities vacant, which appertain to us; except this, that such custody shall not be sold.

“S. 6. Heirs shall be married without disparagement.”

Up to this time no protection was given to tenants

holding by agreement or quasi agreement, as "tenant for life and for years came in by demise and lease of the owner of the land, &c., and therefore he might in his demise provide against the doing of w. by his lessee, and if he did not, it was his negligence and default." 2 Inst. 299; Co. Lit. 54 *a*. But the Statute of Marlbridge was passed to remedy this deficiency, and by this Act (1267), 52 Henry 3, c. 23, s. 2, it was enacted:—

"Also fermors during their terms shall not make w., sale, nor exile of house, woods, and men, nor of anything belonging to the tenements that they have to farm, without special licence had by writing of covenant, making mention that they may do it; which thing if they do, and thereof be convict, they shall yield full damage and shall be punished by amerciament grievously." (*a*)

This statute extended only to those who held by lease for life, lives, or a term of years by deed or without deed. 2 Inst. 145. See Co. Lit. 54 *a*, as to special occupant.

By the Statute of Gloucester (1278), 6 Ed. 1, st. 1, c. 5, tenants not holding by lease were protected, a writ of w. was instituted, and penalties were increased. It runs as follows:—

"A man from henceforth shall have a writ of w. in the chancery against him that holdeth by law of England, or otherwise for term of life, or for term of years, or a woman in dower. (2) And he which shall be attainted of w. shall lose the thing that he hath wasted, and moreover shall recompense thrice so much as the w. shall be taxed at. (3) And for w. made in the time of wardship, it shall be done as is contained in the Great Charter. (4) And where it is contained in the Great Charter, that he which did

(*a*) The word "sale" is not in the Latin.

w. during the custody, shall leese the wardship, (5) it is agreed that he shall recompense the heir his damages for the w., if so be that the wardship lost do not amount to the value of the damages before the age of the heir of the same wardship." (b)

This chapter was repealed in 1879 by 42 & 43 Vict. c. 59.

Chapter 13 of the same statute was passed to prevent w. while a suit was pending, and was in these words :—

"After such time as a plea shall be moved in the City of London by writ, the tenant shall have no power to make any w. or estrepement of the land in demand (hanging the plea), and if he do, the mayor and bailiffs shall cause it to be kept at the suit of the demandant. (2) And the same ordinance and statute shall be observed in other cities, boroughs, and everywhere throughout the realm."

This was repealed as to England and Ireland respectively by the Statute Law Revision Acts, 1863 and 1872.

It is said in 2 Inst. 328 that there were already writs of estrepement at Common Law to protect the property demanded after judgment and after verdict, but that in the opinion of some there was no such writ at Common Law pendente placito until this statute, though it seems that there was one at Chancery, devised in aid of the actions of w. The writ of estrepement is obsolete, an injunction covering all the ground and more.

A clear account of the history of these writs is given by Blackstone, Book 3, c. 14.

Spelman, in his Glossary, says :—"Estrepamentum.

(b) The writ of w. was abolished by 3 & 4 Will. 4, c. 27, s. 36.

Forensibus nostris appellatur destructio et vastum quod ab usufructuario, qui tenet ad terminum vitæ, vel annorum fit; aut fieri permittitur, in domibus, terris seu boscis proprietarii. . . . Angl. Strip. . . . videturque estrepamentum gravius vasti genus designare."

By the Statute of Westminster the 2nd (1285), 13 Ed. 1, c. 14, repealed by 42 & 43 Vict. c. 59 (1879), the writ of prohibition was abolished, and a writ of summons substituted; and by 20 Ed. 1, st. 2 (1292), an heir was given the same remedy as his ancestor.

11 Hen. 6, c. 5 (1433), was passed to meet the case of tenants who granted over their estates in order to avoid actions of w., and committed w. while still remaining in receipt of the profits.

The next statute to be noticed is 4 Henry 7, c. 17, s. 6 (1487), by which the infant heirs of cestuis que use, holding by knight's service, were given the same right of action against their guardians as if they held the legal estate. This statute was repealed as to England and Ireland respectively by the Statute Law Revision Acts, 1863 and 1872, and had previously become obsolete by operation of the Statute of Uses.

By 8 & 9 Will. 3, c. 11, s. 3 (1697), a successful plaintiff, recovering less than 20 nobles as single damages, was to recover his costs, and if unsuccessful was to pay them.

In the note to *Greene v. Cole*, 2 Wms. Saund. 644, it is said, the action of w. (c) "is now very seldom brought, and has given way to a much more expeditious and easy remedy by an action on the case in the nature of w. The plaintiff derives the same benefit from it, as from an action of w. in the *tenuit*, where

(c) It was abolished by 8 & 4 Will. 4, c. 27, s. 36.

the term is expired, and he has got possession of his estate, and consequently can only recover damages for the w.; and though the plaintiff cannot in an action on the case recover the place wasted, where the tenant is still in possession, as he may do in an action of w. in the *tenet*, yet this latter action was found by experience to be so imperfect and defective a mode of recovering seisin of the place wasted, that the plaintiff obtained little or no advantage from it; and, therefore, where the demise was by deed, care was taken to give the lessor a power of re-entry, in case the lessee committed any w. or destruction; and an action on the case was then found to be much better adapted for the recovery of mere damages than an action of w. in the *tenuit*. It has also this further advantage over an action of w., that it may be brought by him in the reversion or remainder for life or years as well as in fee, or in tail; and the plaintiff is entitled to costs in this action, which he cannot have in an action of w. However, this action on the case prevailed at first with difficulty. Thus, where a remainderman in fee of a *copyhold* estate brought an action on the case in the nature of w. against tenant for life for w. done in the dwelling-house, the defendant demurred generally to the declaration, and in support of the demurrer it was objected, first, that an action on the case did not lie; for Lord Coke, on the Statute of Gloucester, says, that at Common Law the reversioner had not any remedy for w. committed by the termor, it being his own folly that he had not taken security against it by covenant; and, secondly, that the jury could not tell what damages to give, for it was uncertain how long the tenant for life would live, and the house might be repaired by him in his lifetime. And of that opinion were

Windham and Charlton, Justices, strongly ; but Pemberton, C.J., and Levinz were of a contrary opinion. And, as to the first objection, they said that Lord Coke was to be understood according to the subject matter of which he is speaking—namely, that there was no remedy by an action of w. And Pemberton said that a lessor might without doubt at this day waive his remedy by action of w., and bring an action on the case against his lessee for w. ; and cited Cro. Eliz. 361, *Jeremy v. Lowgar*, where husband, seised in fee in right of his wife, made a lease for years, lessee burnt the house, the husband brought an action on the case, and by the two Judges then in court, it was held that it lay, notwithstanding the objection that w. did not lie in such a case at the Common Law, because he might have secured himself by covenant. And as to the second objection, Pemberton and Levinz said it would be unreasonable to compel him to wait until the death of the tenant for life to see if he would repair, for perhaps in the meantime either the plaintiff or defendant might die, and then the action founded on a tort would die with the person ; or the reversioner might wish to dispose of the reversion, which, by reason of w. committed by the tenant for life, would not sell for so much money as it would do if the house were in proper repair. *Jefferson v. J.* (1681), 3 Lev. 130; *Jesser v. Gifford* (1767), 4 Burr. 2141, &c.”

“It appears that w. was first maintainable against the tenant for years for injuries done by strangers, then trespass was held to be at the suit of the lessor of the tenant at will against a stranger, and, lastly, case against a stranger doing a permanent injury to premises let on lease.” Cresswell, arguendo in *Young v. Spencer* (1829), 10 B. & C. at p. 150.

In *Doherty v. Allman* (1878), 3 App. Cas. 732, Lord Blackburn said: "The old writ of w. is gone, and we have nothing to do with it now, but an action in the nature of w. still exists in the Courts of Common Law." And as to "Account" and "Injunction," see those chapters.

THE NATURE OF WASTE.

The Nature of Waste.

Changing Nature of Thing demised, &c.

Ploughing Ancient Meadow and Pasture.

Husbandry Covenants, &c.

Pernicious Crops.

Warren.

Fishponds.

Dovecots.

Deer Parks.

LORD COKE in Co. Lit. 53 *a* says: "An action of w. doth lie . . . for w. or destruction in houses, gardens, woods, trees, or in lands, meadows, etc., or in exile of men to the disinherison of him in the reversion or remainder." And in 8 Bacon's Ab. 379 w. is defined as "the committing of any spoil or destruction in houses, lands, etc. by tenants, to the damage of the heir, or of him in reversion or remainder." "Those acts are not w. which are not prejudicial to the inheritance," per Richardson, C.J., in *Barret v. B.* (1634), Hetley 36.

The old Common Law interpretation of w. was applied with merciless severity, so that even when the reversioner was benefited by a change in the nature of the premises, a tenant would often find himself dispossessed by the statute and mulcted in treble damages. Thus, in the well-known case of *London (City of) v. Greyme* (1607), Cro. Jac. 181, *infra*, p. 134, the conversion of a manual mill into a horse-mill was held w.; and in *Greene v. Cole* (1669), 2 Wms. S. 644, a tenant who had pulled down a brew-house and erected a number of small tenements, thereby improving the rent from £120 to £200 a year, was held guilty of w.

And see 8 Bacon 382, 387, where building a larger house in place of a smaller is said to be w.

It is necessary now to remember that, although the old action of w. with its penal consequences has been abolished, the Court will not even now aid a plaintiff, where the injury is either trivial or meliorating. See pp. 125–144.

Strictly speaking w. can only be committed in the thing held by the tenant, and so it is not w., but trespass, if he cut down or injure trees excepted from a demise. *Goodtitle v. Vivian* (1807); 8 East 190; 7 Comyn 657.

In *Darcy v. Askwith* (1618), Hobart 234, we read: “It is generally true that the lessee hath no power to change the nature of the thing demised; he cannot turn meadow into arable, nor stub a wood to make it pasture, nor dry up an ancient pool or piscary, nor suffer ground to be surrounded, nor decay the pale of park: for then it ceaseth to be a park, nor he may not destroy or drive away the stock or breed of anything, because it disinherits and takes away the perpetuity of succession, as villeins, fish, deer, young spring of woods and the like; but he may better a thing of the same kind, as by digging a meadow, to make a drain or sewer to carry away water.” Co. Lit. 53 *b*; 8 Bacon 382; 22 Viner 436.

It is w. also to cut down trees that are timber, whether by the Common Law, *i.e.* oak, ash, and elm, or by the custom of the country, and “the cutting down of willows, beech, birch, ash, maple or the like, standing in the defence or safeguard of the house, is destruction.” Co. Lit. 53 *a*. So is cutting and selling whitethorns if “it be laid that they grew in pasture for defence of cattle, and were of the greatness of timber.” Cro. Jac. 127. “Willows within sight of the manor, which shelter it from the wind, cut by

the tenant is w., otherwise if they grow in another place, and the same law if they sustain a bank." Broke, W. pl. 7, 20, 130. See Dyer 35 *b*, and *Sir George Stripping's Case* (1622), Winch 15, where it was held w. in law to "cut down certain willows, which grew upon the banks of the river, by which a bank fell down, and a meadow adjoining was overflowed." Cf. "Permissive W." (a).

It seems that "no user of a tenement which is reasonable and proper, having regard to the class to which it belongs, is w." Per Fry, J., in *Saner v. Bilton* (1878), 7 Ch. D. 815, and see *Manchester &c. Co. v. Carr* (1880), 5 C. P. D. 507.

Apart from questions of trivial or meliorating w., pulling down a partition (though erected by the tenant, *Cooke v. Humphrey* (1563), Moore 178, citation), and making two rooms one, pulling down a garret, turning a hall into a stable, may all be acts of w. Broke, W. pl. 143; 2 Rolle Abr. 815; 8 Bacon 387. See *Young v. Spencer* (1829), 10 B & C. 145, where the opening of a fresh street-door, though not otherwise injuring the house, was ordered to be left to the consideration of the jury as a possible injury to the reversion through affecting the evidence of title; but see "Title," p. 129. And *Aston v. A.* (1749), 1 Vesey 264. Again, in 2 Rolle Abr. 815 it is said, "if the tenant of a dove house, warren, park, vivary pools, or such like take so much that so much store is not left as he found at the time of the demise, it is w." Cf. 22 Viner, p. 438.

It is a matter exceedingly difficult to determine, in many cases, what is sufficient to raise the presumption that the thing demised is only to be enjoyed by the termor

(a) Other instances of w. will be noticed in the course of the book in places convenient to them.

in the state of nature in which it is demised, as it cannot now be said, in view of the decisions on "meliorating w.", that to change the nature of the thing demised is always such w. as the law will punish or restrain. And see p. 18.

There have, however, been a sufficient number of cases in this century to enable us to form some conclusion as to the present state of the law. Thus, in *Hunt v. Browne* (1837), Sau. & Sc. 178, O'Loghlen, M.R., restrained a tenant for lives renewable for ever from converting a dwelling-house and garden, etc., containing 14a. 2r. 30p., into a cemetery, as "the proposed plan would entirely change the nature of the thing demised, and change it so as to disable the plaintiffs from ever after using it." There was a power to surrender after every third year. This was followed in *Cregan v. Cullen* (1864), 16 Ir. Ch. R. 339, which also decided that a purchaser with notice of past w. was entitled to restrain future w.

"There is very little to be found in the books of English law as to what is a sufficient indication of the purpose for which a thing is let. . . . It seems generally to be assumed that a house is let for the purpose of being dwelt in, and garden or arable ground for the purpose of being cultivated; and certainly there is nothing that I can find to show that any one ever suggested that it could not be proved that lands were let for a particular purpose unless there was a contract on the part of a lessee to use them for that purpose." Per Lord Blackburn, in *Westropp v. Elligott* (1884), 9 A. C. 826. See particularly *Brooke v. Mernagh* and *Brooke v. Cavanagh*, *infra*, p. 16.

In *North v. Guinan* (1829), Beatty 342, partition of a house was refused as the landlord might immediately "restrain the parties from executing it, by another

act amounting to w. ; and at law, the tenant is guilty of w. if he pulls down doors, windows, wainscot, or in any way alters the material form and features of the demised buildings." Per Hart, L.C.

In an agricultural lease there is an implied undertaking on the part of the tenant to practise good husbandry according to the custom of the neighbourhood, and this will usually prevent him from making any serious alterations, as for instance, changing meadow into arable (as to which, see p. 18) or a hop-yard into arable, as in *Moyle v. M.* (1599), Owen 66. Again, it was decided in *Powley v. Walker* (1793), 5 Durn. & E. 373, that the bare relation of landlord and tenant is a sufficient consideration to oblige the tenant to farm in a good and husbandlike manner, according to the custom of the country. So *Brown v. Crump* (1815), 1 Marshall 567. See further as to "custom of the country," *infra*, p. 32.

Assurance Specifying the Nature of the Tenement.—Closely allied to the main subject of this chapter, w. by changing the nature, is that part of the law of contract by which the tenant of a property, demised by words describing its character, is taken to have impliedly contracted to preserve its nature, as demised.

Thus, as we shall see elsewhere, p. 19, the tenant of land demised as "meadow" cannot avail himself of the law as to "meliorating w." so as to convert it into market-garden ground. *Meux v. Cobley* (1892), 2 Ch. 253 ; cf. *Birch v. Stephenson* (1811), 3 Taun. 469 ; and in a much older case of *Atkins v. Temple* (1625), 1 Rep. in Ch. 14, premises "which according to the grant of them were to be used only as meadow and pasture" were protected by injunction.

Again, in *Coppinger v. Gubbins* (1846), 9 Ir. Eq. R. 304, 3 J. & L. 397, Sugden, L.C., said: "A mere demise of a bog *quod* bog does not give a right to cut turf and sell it (b), or to cut the bog itself, particularly where the bog is demised along with other property, because it is for the purpose of consumption; time may consume it all in any case, but in this there is no immediate necessity to carry it away for sale. . . . Where bog and nothing else is demised, and turf could be cut for no valuable purpose except for sale; or if it was a bog always cut for sale, and demised as such in the same manner as an open mine, such cases depend on contract, and must be considered as standing on their own ground, and no doubt the lessees would have a right to cut turf and sell it;" and p. 313, "I am of opinion that the mere grant of an estate, including a bog *eo nomine*, will not *per se* give the right to the tenant to cut turf for sale." But in this case the particular bog in dispute was not demised *eo nomine*, though another was; merely the tenant who had sold his freehold to the lessor was to enjoy the land as he had before the conveyance. This was held not to allow him to cut for sale as an owner in fee simple could do, and as he himself had done before selling to the plaintiff, following *Chatterton v. White* (1839), 1 Ir. Eq. R. 200; *Massy v. Gubbins* (1840), Longf. & T. 88; so (*Jack v. Creed* (1828), 2 Hud. & B. 128), the demise of land and bog "in as large, ample, and beneficial a manner as the same was previously enjoyed" by the tenants, will not enable the lessee to cut for sale, unless the bog cannot otherwise be enjoyed, or it be an "open" bog, which the preceding tenants

(b) So that *Montgomery v. Cunningham* (1825), 2 Molloy 536, by McMahon, M.R., to the contrary is not law.

have cut rightfully for sale, *ib.* p. 143. And no right to cut for sale is given by a demise of land with bog and commonage "in as large and ample a manner" as the landlord held the same. *Burrowes v. Hayes* (1834), *Hayes & J.* 597. If, however, a bog is demised without other land, or cutting for sale is the only profitable mode of using the bog, it seems that it may be so cut. *Chatterton v. White*, u.s.; *Burrowes v. Hayes*, u.s.; *Anon.* (1824), 1 *Hog.* 147; *Coppinger v. Gubbins*, u.s. In *Pollard v. Smith* (1826), 1 *Hogan* 391, a bog was demised as "an improvable bog," and McMahon, in giving judgment, said: "Prima facie, the defendant has no right to cut turf on this bog, unless it shall appear that cutting away the surface was the only way of improving it. The effect of the demise is to give the defendant what was bog to be converted into pasture or tillage; but not to give permission to use it as bog merely, without any view to improvement." (See "Meliorating," p. 134.)

As to lessee for lives renewable for ever, see *Coppinger v. Gubbins*, u.s., and refer to index.

A practice of cutting turf for sale, even continued for eighty years, will confer no right as against the landlord, where the leases give only a right to estovers. *Courtoun v. Ward* (1802), 1 *Sch. & Lef.* 8; *Burrowes v. Hayes*, u.s.

As to common of turbary, see *Tyrringham's Case* (1584), 4 *Coke* 36 *a*; *Ely (Dean of) v. Warren* (1741), 2 *Atk.* 189, etc.

See "botes" and "estovers," pp. 44, 53.

In *London (City) v. Pugh* (1727), 4 *Bro. P. C.* 395, an interim injunction was granted to restrain a lessee from digging up a bowling-green, demised *eo nomine*, and carrying away subjacent gravel: and this although

there was a provision for a penal rent on conversion. Cf. *Atkins v. Temple* (1625), 1 Rep. in Ch. 14, p. 19, *infra*.

In *Maunsell v. Hort* (1877), 11 Ir. Eq. 478, premises were demised as a stable and coach-house, and their conversion into a butcher's shop was held illegal.

However, it would appear from *Doherty v. Allman* (1878), 3 A. C. 709, that the defence of melioration may be successfully pleaded even where premises are specifically described. But in this case there was a covenant to uphold "all improvements."

Brooke v. Mernagh (1888), 25 L. R. Ir. 86, is a very recent case on this subject. There the tenant permitted the erection of four huts or buildings, called "Land League Huts," accommodating a large number of persons. These buildings were two-storeyed wooden houses on brick foundations, with brick partitions and chimneys, in one block of 100 feet long, with heating and cooking stoves in the living rooms. Evidence was given that the erection of the buildings injured the rest of the property of the landlord and the holding itself, and interfered seriously with the other holdings. Chatterton, V.C., said: "The defendant is, and has been for over ten years, tenant to the plaintiff from year to year, of a small piece of land containing a statute acre, at the rent of ten shillings a year. This piece of ground was demised as an ordinary agricultural holding, and was treated and cultivated as such by the tenant. There was upon it one thatched labourer's cottage, sufficient for the use of the holding, and no other dwelling-house. . . . It is sworn, and not denied, that the piece of land demised is not suited to the erection of buildings. From such a letting it must in my opinion be implied that

the defendant agreed with the plaintiff that he would preserve it as an agricultural holding during the demise. The erection of these houses upon it appears to me to make a material change in the nature of the demised premises, and to convert them to a substantial extent into a collection of dwelling-houses. This I consider to be both a breach of the implied agreement, and also to be w. . . . If the erection of these houses were not held to be w., there would be nothing to prevent the defendant from covering the whole surface of his holding with similar erections, and thus converting an agricultural holding into a collection of houses—in fact, a village. This Court has the power to restrain such a change by injunction. . . . The tenancy is but one from year to year, with such rights (if any) as recent legislation has appended to such tenancies; the security for the rent is not improved, but, on the contrary, diminished; for if the landlord were to evict the premises, they would have almost to a certainty remained on his hands, incapable of being let, as no new tenant would have ventured to expose himself to the dangers to his person, his business, or his property, which under such circumstances would have resulted.” An injunction was granted against permitting the buildings to continue. The same result was arrived at in *Brooke v. Cavanagh*, ib. p. 97. Porter, M.R., reviewed the authorities. The case was subsequently carried to the Court of Appeal, and there dismissed with costs, ib. p. 112.

The last case upon this subject is *Kehoe v. Lansdowne* (1893), A. C. 451, where a former Lord Lansdowne had entered into a very informal agreement to let a piece of land of rather more than ten Irish acres to the then Roman Catholic Bishop of Kildare and his successors, to be held as long as there should be an

officiating clergyman at the chapel of Luggacurren, leases in usual form to be perfected. The lease had not been taken up, but the land and dwelling had been ever since the agreement occupied by the clergymen for the time being, who were not tenants nor liable under the agreement for the fulfilment of its provisions, except as occupants. Maher, the present clergyman, and Kehoe, his immediate superior, had allowed twenty "Plan of Campaign" huts to be erected on the land, such huts merely resting upon the soil. It was held by the House of Lords that the defendants had no power whatever to change the holding into a village, in contravention of the express terms of the agreement whereby a "suitable residence and holding" were provided.

ANCIENT MEADOW (c).

"It is generally true that the lessee hath no power to change the nature of the thing demised; he cannot turn meadow into arable, nor stub a wood to make it pasture, nor dry up an ancient pool or piscary, nor suffer ground to be surrounded, &c.; but he may better a thing in the same kind, as by digging a meadow, to make a drain or sewer to carry away water." *Darcy v. Askwith* (1618), Hobart 234.

Again, Co. Lit. says: "If the tenant convert arable land into wood, or *e converso*, or meadow into arable, it is w., for it changeth not only the course of his husbandry, but the proof of his evidence." 2 Rolle Abr. 814.

What it is.—In 2 Rolle Abr. 814, pl. 6, we read: "If an ancient meadow which had been meadow time out of memory, as brook meadow, is converted into arable

(c) See 8 Bacon 382, 22 Viner 437. It should be premised that in some authorities here quoted the word "ancient" is not used before "meadow," though it has obviously been omitted by a slip.

land, this is w. *Tresham v. Lamb*, pl. 7. But if the meadow sometimes is arable, and sometimes meadow, and sometimes pasture, the ploughing of it is not w."

This pl. 7 appears to have been the second proposition in *Tresham v. Lamb* (1610) which, as reported in 2 Brownl. 46, is obscure. The land, it says, appeared upon examination to be "ridge and furrow; but had been mowed and used for meadow for divers years . . . but the judges would not grant any estrepement to the pasture, for that it was ridge and furrow, and it was no ancient meadow, although it had been mowed time out of mind." This case was much criticised in *Murphy v. Daly* (1860), 13 Ir. C. L. R. 239, where Monahan, J., gave an elaborate, though, it is submitted, mistaken judgment (see *infra*, p. 21), and objected to the reception by the Court in *Tresham v. Lamb* of evidence as to the ground being in ridge and furrow to controvert the proof that it was ancient meadow, afforded by the fact that it had been mowed time out of mind (*d*). In reality, the law seems to be that proof that land has been meadow so far as memory extends not to the contrary, is conclusive evidence of its being ancient meadow in the absence of earlier evidence still.

One of the earlier cases in the books is that of *Atkins v. Temple* (1625), 1 Rep. in Ch. 14, where an action of w. was brought for ploughing ancient meadow and pasture grounds, "which premises, according to the grant of them, were to be used only as meadow and pasture and not otherwise. Precedents being produced, his lordship, assisted with other Judges, declared: That he did find by divers precedents, part in the time of the Lord Ellesmere, and others since, that the ploughing of ancient

(d) See *Fermier v. Maund*, *Martin v. Coggan*, *infra*.

pasture has been restrained by decrees of this Court, and declared, that in those cases so decreed it did not appear that the pastures restrained from ploughing were either so ancient or so rich and fertile as in this case; and his lordship did further declare: That whereas ploughing of meadow by the law is w., he conceiveth that the ploughing of ancient pasture is of equal value with meadow, as no less prejudicial either to the landlord or to the commonwealth, than the ploughing of meadow, and therefore fit to be restrained in Equity." It is to be observed that the judgment of the Court applies generally to ancient meadow and pasture, though in the immediate case there was a special restriction by the grant.

The next case in order of time was *Fermier v. Maund* (1638), 1 Rep. in Ch. 116, where it was proved that the pasture and meadow ground had not been ploughed for thirty-five years and upward. An injunction was granted; see the Record 1637A, Chancery Order 215. The report only says: "This Court would not give way to the ploughing up of ancient pasture, though it was insisted on, that the nature of the ground was for tillage, and had been formerly ploughed." This case is also obscure, as it is impossible to discover whether there was in fact any proof that the land had formerly been ploughed, or whether it was merely suggested from the nature of the ground. See *Tresham v. Lamb*, u.s.

Goring v. G. (1676) is reported in 3 Swans. 661, from Lord Nottingham's MS. A lessee for years, determinable on lives, began to plough during the last and aged life. "Here the pastures had been ploughed within six years before the lease began, and *ergo*, though the lease have continued thirty years, during all which time the pastures have been unploughed, yet that will not make

them ancient pastures within the rule of this Court ; for as to the lessee himself who took these pastures subject to the liberty of ploughing, they remain still so, notwithstanding this forbearance ; otherwise if they had been so long out of lease ; besides, it was said that the pastures being grown lean, and running to fern and moss, the ploughing would be an improvement. Wherefore I granted an injunction only as to the meadows, but not as to the pasture." (e) The words "otherwise if they had been so long out of lease" occasion some difficulty, and have been relied upon in some cases, as *Murphy v. Daly* (*infra*), to uphold the contention that mere length of time will make ancient pasture at any rate as between landlord and tenant ; but this is an obiter dictum, and is also capable of the construction, that in the absence of contrary proof, the expiration of thirty-six years would be sufficient evidence of the pasture being ancient.

In *Gunning v. G.* there was no allegation that the pasture was ancient, and there Jones, J., said: "Arable and pasture ground are convertible, and that which is one of them this year may be the other the next, and the law does not so much distinguish." (1678), 2 Shower 8.

After this there comes a long interval of more than a century before we meet with any more reports on the subject of ploughing up ancient meadow or pasture : and almost the whole of these later cases are Irish, except a few where the question of farming in a husbandlike manner arose.

Recent Irish Cases.—In considering all these Irish decisions it is well to bear in mind that of *Murphy v. Daly* (1860), 13 Ir. C. L. R. 239, where in delivering the considered judgment of the Exchequer Chamber, Monahan, J., went through most of the previous cases and held, "It has

(e) In the following cases, also, *Coggan, Palmer v. McCormick*, *infra*.
melioration was relied on, *Martin v.* And see generally p. 135, &c.

been fully established, at all events in this country, that the continuance of land in the condition of pasture for twenty years continuously, prior to the execution of a lease, indelibly affixes to that land the character of ancient pasture." The ploughing "was consequently a breach of the defendant's covenant not to commit w." Before considering whether this decision was warranted by the state of the authorities, it is well to note, first, that there was also a covenant to manage and cultivate in a proper and husbandlike manner, and secondly, that the land, which had been in pasture for twenty-six years before the date of the lease, lay at the confluence of two rivers, was frequently flooded, and that when ploughed by the defendant, much of the surface was carried down by the flood. It will be seen below that the decision might well be supported on the ground of breach of covenant to manage, &c. in a husbandlike manner, and that it was a very hard case for the landlord.

In *Deane v. Caffray* (1818), 1 Hogan 23, an interim injunction was granted to restrain the tenant from "planting grass potatoes upon ground demised in a state of tillage upwards of twenty years since" for the plaintiff to establish his right at law. This is a converse case of turning tillage to pasture.

In *Martin v. Coggan* (1824), 1 Hogan 120, the defendant alleged that the pasture had ancient plough marks in it, that it was mossy and required breaking up (*f*), and undertook to lay it down again in grass in the course of good husbandry. Sir William McMahon, M.R., said: "I cannot take the tenant's opinion on the propriety of his course of husbandry, neither can I allow ancient pasture to be broken up, though the land requires

(*f*) Probably good draining would have got rid of the moss.

tillage ; the usual form of the affidavit required to support an application for such an injunction is, that the land is ancient pasture or meadow, and has not been burned nor tilled for the last twenty years, and it is for the defendant to show that it ought not to be considered ancient pasture, by reason of its having been in tillage previously to the date of his lease." It is obvious that all that was decided in this case was that ancient pasture is sufficiently proved by twenty years' user, unless the defendant displaces the proof by evidence of previous tillage.

In *Morris v. M.* (1825), 1 Hogan 238, the defendant was tenant for life of a lease for forty-one years dating from 1798, determinable on lives, and the plaintiff was remainderman of the term. The land had been laid down in pasture in 1795, and was so used until after the death in 1819 of the grantee of the lease, under whom both plaintiff and defendant held. The land was held by a farming lease without any restrictive clause. It was admitted that as between landlord and tenant the land was tillage land, though it is not altogether clear why this admission was made, in view of the common law duty of a tenant to cultivate in a husbandlike manner according to the custom of the country. Sir William McMahon said : " I consider, that in fee simple estates, a continuance in pasture for twenty years during the life of the donor or testator, impresses on land the character of ancient pasture ; and have frequently acted on the principle. If the period was less than twenty years, the case is open to evidence of intention, but not otherwise. . . . I am not aware of any case in which, in the absence of express stipulation, an act has been held to be w. as between a tenant for life and a remainderman, which at the same time would not be w. as between the same tenant for life and his landlord."

This case again is open to the observation that the above dictum about twenty years was not necessary for the decision, and that it would be subject to rebutting evidence.

In *Joley v. Stockley* (1825), 1 Hogan 247, the same learned Judge in directing a reference to the Master to inquire what land was ancient pasture, refused to add the words "or not broken up within twenty years before," as that fact would be decisive of the inquiry as directed. This is not a verbatim report, and the addition was probably refused on the ground that under a reference in such a form it would not be open to the defendant to raise the question whether the land was ancient pasture, by adducing evidence of previous tillage.

In *Davies v. D.* (1840), 2 Ir. Eq. R. 414, Pennefather, B., held that meadow laid down by life tenant, though thirty years before, was not ancient.

In *Creagh v. Carmichael* (1844), 7 Ir. Eq. R. 334, Richards, B., on an application for an injunction which seems to have been made *ex parte*, required an affidavit, stating that the deponent knew the lands for twenty years, and that they had not been broken up within that period.

Lastly came the important case of *Palmer v. McCormick* (1889), 25 L. R. Ir. 110. A tenant for life, without impeachment, had, by a settlement made in 1838, power to grant leases subject to impeachment of w. In 1871 he granted a lease to the defendant, providing that, in case any part of the lands demised should be broken up or tilled by the tenant, &c., he should at least two years before the expiration of the term, or sooner determination thereof, lay down in a proper and husbandlike manner the lands broken up or tilled, with grass seeds, and should deliver

up the lands properly laid down in grass. The lease also contained a clause enabling the lessee to surrender at the end of any three years upon giving six months' notice. The plaintiff was entitled to the lands in reversion expectant on the determination of the lease, the lessor having died. There was a lawn of about nine Irish acres visible from the windows of the mansion house, which was alleged by the plaintiff to be ancient pasture, and not to have been broken up or tilled for over fifty years. In January, 1888, the defendant commenced to plough up 1r. 5p., portion of the lawn, which he alleged in his defence to be marshy with rushes, sedgy grass, and some flaggers, that he had failed to improve by drainage, that he intended to relay in grass, and that the lawn was not ancient pasture. He also said that the course of the old avenue had been altered in 1839, and never properly laid down. It was held on the construction of the lease that the defendant was acting within his rights, that no part of the lawn was really ancient pasture, as at the date of the lease part of it had been broken up, and also that the whole of it was within the "husbandry" covenants, that this was a case of meliorating w., and that the parties must be left to their legal rights and remedies. Fitzgibbon, L.J., in a considered judgment said: "All these arguments point to the broad conclusion that the land here in question is not genuine 'ancient pasture' at all, and this is confirmed by the other facts of the case. None of the reasons for the special protection given to 'ancient pasture,' which are fully stated in *Simmons v. Norton*, 7 Bing. 640, apply to this case. There is no difficulty in title, no question of the identity of the land; for the injunction admittedly applies only to an unfenced patch—to only a piece of a field. There is no destruction

of an old sod that cannot be restored for 'years, perhaps ages.' Part of the present 'lawn' was an old orchard full of stumps until (to make it good grass land) the tenant tilled it without objection, and improved it by the process. Another part is the site of an old 'boreen' or 'street' (as it is called on the map of 1821), still full of stones; another part formerly belonged to a cottier holding, and was never properly laid down; and, lastly, all the part north of the avenue (about four acres) is omitted from the suit and from the injunction because it was not in grass for twenty years before the lease, and therefore by its omission from the suit and injunction, may be taken as arable land cultivable by the defendant at his discretion, but subject always to the husbandry covenants which secure all the land against real w. The result of holding this part of the 'lawn' to be 'ancient pasture' would be to produce a 'tesselated' map of the land, protected by injunction, which would in my mind supply a strong argument to show that the remedy had been misapplied.

"To the argument for the defendant based on the circumstance that the land was first laid down in grass by a tenant for life, I attach no weight, save so far as it also corroborates the general conclusion that this was not in fact 'ancient pasture.' I do not think that, as between landlord and tenant, protection by injunction is to be refused to a landlord merely because he is a remainderman, or is not to be granted against a tenant merely because he is an appointee under a leasing power, nor that a limited owner is debarred from giving the character of 'ancient pasture' to demised land, as against the lessee. I see no reason why the successors in title to the reversion on a lease should be unable to enforce against a tenant any

remedies which would be open to the original lessor. The fact that this land was first turned into grass by a limited owner is a fact bearing on its character, and nothing more, just as is the fact that the limited owner protected it by a husbandry covenant, and did not prohibit the tenant from tilling it, nor refer to it as 'ancient pasture' in the lease (g).

"On the other hand, I cannot accept the plaintiff's argument that there is a general and absolute rule, at least in Equity, that whatever land has been in grass, or has been even covered by any sort of natural vesture that can be called 'grass,' for twenty years before a lease, is inexorably condemned to remain untilled for ever. The effects of such a rule, especially under the Irish land laws, would indeed be astounding. Its existence was never even suggested or hinted at as an argument in all the cases which have arisen, and some of which have even reached the House of Lords, upon the question of lettings 'for the purposes of pasture.' There is in my opinion no such rule. If this injunction be right the same remedy must be applied indiscriminately, regardless of natural deterioration of the grass; notwithstanding its running to moss or rushes, notwithstanding the fact that tillage is essential to the judicious and profitable treatment of the land, and notwithstanding that the rule would involve an investigation of the mode in which every field, and even every bit of every field, had been treated for twenty years before it was last let to a tenant. If the judgment of Monahan, J., in *Murphy v. Daly*, 13 Ir. C. L. R. 239, purports to lay down any such rule, the dictum is not necessary to the decision; it would be inconsistent with the authorities from Rolle and Bacon to *Doherty v.*

(g) See *Davies v. D.*, u.s.

Allman, 3 A. C. 723, and it would not be binding upon us. I think, however, that Monahan, C.J., did not intend to lay down any such universal rule, and that he was speaking only of the case before him, in which undoubted injury seems to have been done to the lands, and in which the Court was manifestly endeavouring to escape from what was regarded as an unjust and unreasonable verdict."

To sum up these Irish cases, we may safely conclude that there is no rule of law that land which has been in grass for twenty years is, irrespective of its former history, "ancient pasture" either as between landlord and tenant, or tenant for life and remainderman; that, on the other hand, proof that the land has been in grass for twenty years before the making of the instrument under which the tenant holds is sufficient evidence of ancient pasture to throw the burden of disproof on the tenant. There is no case, as far as the author is aware, in which an English Court has adopted the term of twenty years in similar circumstances, but in England instances of ploughing meadow by tenants without leave are extremely rare; however, when a case arises, the English Courts will probably adopt the Irish rule (*h*), both out of respect to sister Courts and from regard to the proof required in cases of easements.

Birch v. Stephenson (1811), 3 Taun. 469, was referred to in *Murphy v. Daly* as an instance of an English Court following the alleged rule. This was an action on a covenant in a lease for ninety-eight years to pay an increased rent for any meadow land tilled within the last twenty

(*h*) In *Robinson v. Byron* (1785), 1 Bro. C. C. 588, the Lord Chancellor said: "The Court will not restrain that which has been enjoyed for twenty years past."

years of the term. It was held, in effect, that the land being demised as "meadow" is sufficient evidence of its state at the time of the execution of the lease; that land sown with corn and clovers is still in tillage, though this may be the proper way of commencing the laying down of pasture. Lawrence, J., at p. 475 said: "I agree that it was a matter of indifference to the lessor what was done during the first part of the lease, so long as his reversion was not injured; therefore, he says, you may do what you will during the first period, but whatever was meadow when I demised, must be meadow for twenty years before I take it back, that I may receive it *in the state of* ancient meadow." It is sufficient to give this quotation in order to show that the case gave no support to the doctrine contended for.

In *Hunt v. Browne* (1837), Sau. & Sc. 178, O'Loghlen, M.R., restrained the turning of ancient meadow, &c., into a cemetery, in spite of the existence of a penal rent for ploughing it up and the fact that the lessee had a lease for lives renewable for ever.

United States.—The reasons given in England for the rule against changing the nature of the property by the tenant "are not applicable to this commonwealth, and consequently such changes here do not constitute w., unless such changes are prejudicial to the inheritance. . . . That the principle of the common law under consideration was then (at the time of the immigration to the States) inapplicable to the condition of the country is obvious; nor has it been applicable at any time since; for it has been the constant usage of our farmers to break up their grass lands for the purpose of raising crops by tillage, and laying them down again to grass, and otherwise to change the use and cultivation of their lands, as occasions have required.

A conformity, therefore, to this usage cannot be deemed w. . . . In this country, it is difficult to imagine any exception to the general rule of law, that no act of a tenant will amount to w., unless it is or may be prejudicial to the inheritance, or to those entitled to the reversion or remainder." *Pynchon v. Stearns* (1846), 45 Am. Dec. 207. Again in *Clemence v. Steere* (1850), 53 Am. Dec. 621: "Conversion of meadow into pasture is not w. . . . It is said that the pastures have been permitted to become overgrown with brush. In England that would be w., but you would not expect so high a state of cultivation in Burrillville as in England, or as in the vicinity of a populous city. There must be such neglect in cutting the brush as a man of ordinary prudence would not permit."

So a dowager changing pasture to woodland does not commit w. *Clark v. Holden* (1856), 66 Am. Dec. 450.

Lord Coke on Preferable Cultures.—In a note to *Tyrringham's Case* (1584), 4 Co. 39 *a*, Lord Coke says: "It is true that agriculture and tillage is greatly respected and favoured as well by the common law, as by the common assent of the king, lords spiritual and temporal, and all the commons, in many Parliaments. 1. The common law prefers arable land before all other, and therefore for its dignity it ought to be named in a *præcipe* (*i*) before meadow, pasture, wood, or any other soil; and it appears by the statute of 4 H. 7, c. 19, that six inconveniences are introduced by subversion or conversion of arable land into pasture, tending to two deplorable consequences. The first inconvenience is the increase of idleness, the root and cause of all mischiefs. 2. Depopulation and decrease of populous towns, and

(*i*) See F. N. B. 2 *c*, and *Savel's Case* (1615), 11 Co. 55.

maintenance only of two or three herdsmen, who keep beasts, in lieu of great numbers of strong and able men. 3. Churches for want of inhabitants run to ruin, and are destroyed. 4. The services of God neglected. 5. Injury and wrong done to patrons and curates. 6. The defence of the land, for want of men strong and enured to labour, against foreign enemies, weakened and impaired. The two consequences are: 1. These inconveniences tend to the great displeasure of God. 2. To the subversion of the policy and good government of the land, and all this by decay of agriculture, which is there said to be one of the greatest commodities of this realm, which one Act of Parliament as to this purpose may, as a figure in arithmetic, in the third place stand for an 100."

In much the same words Lord Coke speaks in Co. Lit. 85 b, adding: "And the common law giveth arable land (which anciently is called hyde and gaine) the pre-eminency and precedency before meadows, pastures, woods, mines, and all other grounds whatsoever; and averia carucæ, the beasts of the plough, have in some cases more privilege than other cattle have. And amongst the Romans agriculture or tillage was of high estimation, in so much that the senators themselves would put their hand to the plough, and it is said, that never prospered tillage better, than when the senators themselves ploughed (such force hath the example of superiors)." Then follow quotations from Cicero, Vergil, and Seneca.

Again, in *Hill v. Grange* (1556), Plowden 169: "Everything is placed in writs by the rule of the Register, according to its dignity, for which reason a messuage is placed before land, and land before meadow, and meadow before pasture, *et sic de similibus*. And everything is ranked or distinguished in dignity according

to its necessary use in life, for to have a house for a man to dwell in, and to defend his body against the coldness and inclemency of the air, is more necessary than to have land to plough for bread; and to have land for bread is again more necessary than to have meadow for hay for cattle; and to have meadow for hay which will serve the whole year is more necessary than pasture, *et sic de similibus*, wherefore a messuage is more worthy than land."

HUSBANDRY COVENANTS. CUSTOM OF THE COUNTRY.

Husbandry Covenants.—In *Drury v. Molins* (1801), 6 Vesey 328, Eldon, L.C., granted an injunction to restrain ploughing up pasture land, saying he thought a covenant to manage pasture in a husbandlike manner was equivalent to a covenant not to convert pasture into arable. In *Grey de Wilton v. Saxon* (1801), 6 Vesey 106, an injunction was granted in protection of a covenant not to convert meadow. And in *Pratt v. Brett* (1817), 2 Madd. 62, a tenant from year to year was restrained "from ploughing up any of the ancient meadow, or any of the old pasture land belonging to the said farm" until answer.

Special husbandry covenants will not be enforced against a tenant who is merely holding over, unless he has paid rent and so become a tenant from year to year. *Kimpton v. Eve* (1813), 2 V. & B. 349.

Custom of the Country.—But even without covenants a tenant is bound to manage his agricultural land in a husbandlike way according to the custom of the country; and this obligation will generally prevent him from breaking pasture.

Thus, in *Onslow v. —* (1809), 16 Vesey 173, a yearly tenant under notice to quit was restrained from

carrying away crops and manure, &c., and cutting hedge-rows, except according to custom. And see *Lathropp v. Marsh* (1800), 5 Vesey 259; *Kimpton v. Eve* (1813), 2 V. & B. 349. This was followed in *Walton v. Johnson* (1848), 15 Sim. 352, where the tenant had agreed to cultivate in a husbandlike manner. See "Bad Husbandry," *infra*, p. 35.

In *Meux v. Cobley* (1892), 2 Ch. 253, the defendant had covenanted in a lease dated January, 1889, that he would "in all respects cultivate and manage the farm, and every part thereof, in a good and proper and husbandlike manner according to the best rules of husbandry practised in the neighbourhood." The lessee erected in part of an arable field two large glass houses for the cultivation of tomatoes and hothouse produce for the London market, with the consent of the plaintiff. In May, 1890, he commenced to build a third house in the same field, but whether with or without the lessor's assent was doubtful. The plaintiff brought his action alleging breach of covenant and w. "From the evidence it appeared that in the neighbourhood of the defendant's farm not only were there several market gardens, which had existed as such for many years, but that several farms, originally agricultural, had been converted into or utilised as market gardens, and that, owing to the proximity of the farms to London, that had been found to be the most profitable mode of cultivation." Kekewich, J., held that the defendant was entitled to use his farm as a market garden, except as to such portions as were covered by special provisions, and "He cannot convert pasture into arable, and, therefore, he will find some difficulty, I apprehend, in turning the pasture land into market garden land, even though the market garden, if

covered with trees, cannot be ploughed." The grass land was specially conveyed as "meadow." . . . "It has been proved to me conclusively, that what the defendant is doing, so far from being an injury to the inheritance, is of the greatest possible advantage; and that the addition of these houses, if they are substantially built, and if they are kept in good order, is a most advantageous addition to a farm of this kind in the neighbourhood of London."

In *Harrow School v. Alderton* (1800), 2 Bos. & Pul. 86, where the jury assessed at three farthings the damage caused by ploughing up three closes of meadow and converting them to garden ground and building on them, the Court gave leave to the defendant to enter judgment for himself, so as to avoid forfeiture under the Statute of Gloucester; and in such a case the Court would be justified in refusing an injunction on the principle, "de minimis non curat lex." See *Doherty v. Allman* (1878), 3 A. C. at p. 723, *infra*, p. 131, 139.

Legh v. Hewitt (1803), 4 East 154, 7 R. R. 545, was a case in which the plaintiff declared in assumpsit that the defendant being his tenant (apparently without a formal lease) of a farm containing fifty-five Cheshire acres, had ploughed up and converted into tillage five Cheshire acres of grass land, which according to good husbandry and the custom of the said country ought not to have been ploughed up, &c., and that he had an excessive amount (one-half) in tillage at one time. The witnesses agreed that this was contrary to good husbandry, but could not speak of any custom of the country independent of the obligation of covenants. The jury, influenced by the opinion of the Judge, found the custom not proved, but the Court above ordered a new trial, Lord Ellenborough saying: "What shall be considered in farming as a good and husbandlike

manner must vary exceedingly according to soil, climate, and situation. And, therefore, the custom of the country with reference to good husbandry must be applied to the approved habits of husbandry in the neighbourhood under circumstances of the like nature. That is the fair and natural meaning of the words of the contract as laid. And perhaps a contract to occupy an estate in a good and husbandlike manner simply would have imposed the same duty on a tenant; because the same sort of evidence drawn from the approved practice of that part of the country, would have been brought forward to show what was good husbandry." The other Judges agreed that the "custom of the country" was not to be taken in a precise sense, as denoting a uniform course of husbandry.

Bad Husbandry.—"If a lessee of arable land suffers it to lie fresh and without manure, so that the land grows thorns and other trees, this is not w., but bad husbandry. Broke, W. pl. 5; 2 Rolle Abr. 814; 22 Viner 437; 8 Bacon 382. But the bare relation of landlord and tenant is a sufficient consideration to oblige the tenant to farm in a good and husbandlike manner, according to the custom of the country; *Powley v. Walker* (1793), 5 Durn. & E. 373, followed in *Hallifax v. Chambers* (1839), 4 M. & W. 662 (a case of over-cropping), and as was said too by Lord Blackburn in *Westropp v. Elligott* (1884), 9 A. C. at p. 823: "In the absence of any express terms, the law implies, from the relation of landlord and tenant, that it is the duty of the tenant to do or to leave undone some things, and a promise is implied from the mere relation of landlord and tenant on which an action lies for a breach of that duty. The most important of these, in the case of an agricultural holding, are not to commit w. and to manage the property in a husbandlike manner."

In the well-known case of *Hutton v. Warren* (1836), 1 M. & W. at p. 476, Baron Parke said, during the argument: "It is not w. at Common Law, either wilful or permissive, to leave the land uncultivated. In order to oblige him to farm according to good husbandry, you must have either some express contract, or some implied contract from the custom of the country."

Custom not immemorial.—The custom, though so called, is nothing more than the usage in the neighbourhood, and need not be immemorial. *Dalby v. Hirst* (1819), Brod. & B. 224. But the practice of a particular person in letting his farms is not a custom. "The law takes cognisance of the divisions of the country into counties or parishes, which are legal and public divisions, but not into properties or estates, which are purely private in their nature. Non constat that the party becoming tenant upon it for the first time would hear of it." It was also suggested by the Court that where the reversion is severed, the stipulations as to cultivation might be extinguished.

The Principle.—The principle upon which custom has been imported into agreements between landlord and tenant is best expressed in *Hutton v. Warren* (1836), 1 M. & W. 474, where Parke, B., delivered the judgment of the Exchequer Chamber: "It has long been settled that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions in life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption, that in such transactions the parties did not mean to express

in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages. . . . The common law does so little to prescribe the relative duties of landlord and tenant, since it leaves the latter at liberty to pursue any course of management he pleases, provided he is not guilty of w., that it is by no means surprising that the Court should have been favourably inclined to the introduction of those regulations in the mode of cultivation, which custom and usage have established in each district to be the most beneficial to all parties."

There are numerous cases on the importation or exclusion of particular customs into agricultural agreements, such as *Stafford v. Gardner* (1872), 7 C. P. D. 242; *Mansel v. Norton* (1883), 22 Ch. D. 769; and the cases collected under *Wigglesworth v. Dallison*, 1 Sm. L. C., q. v.

Incumbency. Land not Agricultural.—This does not apply to an incumbency, where there is no contract of tenancy, *Bird v. Relph* (1833), 4 B. & Ad. 826; nor to land that is not agricultural, e.g. garden ground, *Johnstone v. Symons* (1847), 9 L. T. 535.

Inconsistent Condition.—"If any condition is found in the lease necessarily repugnant to or inconsistent with the custom, the latter is excluded; for it can only be called in aid where the former is silent upon the subject." *Holding v. Pigott* (1831), 7 Bing. 465. In *Tucker v. Linger* (1883), 8 A. C. 508, a written agreement for lease reserving to the landlord "all mines and minerals, sand, quarries of stone, brick, earth, and gravel pits," was held not inconsistent with a custom allowing the tenant to gather and sell without stint all flints turned up and removed in the course of good husbandry.

Pernicious Crops.—“If a tenant for life plant woad on the land, which is of so poisonous a quality that it destroys the principles of vegetation, without an express power in his lease, where it is usual to have such powers, it may be considered w., and the Court of Chancery may grant an injunction.” *Powis v. Dorall*, 8 Bacon 419. So *Tresham v. Lamb* (1610), 2 Brownl. p. 46, and *Pratt v. Brett* (1817), 2 Madd. 62, in the latter of which cases there was a husbandry covenant, and the sowing of mustard was restrained. However, in 2 Rolle Abr. 815, “It seems that it is not w. for a lessee at the end of the term to sow the land with woad, although it will not carry corn for seven years after.” But it is bad husbandry, and though not within the old statutory action, would be reached by an action for damage to the reversion. See p. 9.

Unexhausted Plants.—In *Wetherell v. Howells* (1808), 1 Camp. 227, the defendant’s term in garden ground expired at Lady Day, 1807, and in the preceding autumn he had ploughed up two acres of strawberry beds in full bearing, for sowing with turnip seed. Lord Ellenborough said: “The taking up of strawberry roots was not necessarily of itself an injury to the inheritance for which an action would lie; but if the defendant in this instance ploughed up the beds before they were exhausted, and without having any reasonable object in view, he had certainly prejudiced the plaintiff’s reversionary estate, and it could scarcely be doubted that he did so wrongfully and maliciously.” This was not apparently an action of w., but injury to his property in the strawberries, which were his on the principle, “quicquid plantatur solo volo cedit.” See as to fruit-trees, p. 95.

WARREN.

Definition.—A warren, according to Spelman, is a privilege which any one has in his own lands either “ex concessione Regis vel ex præscriptione, venandi, prædandique feras et volucres ad Warennam pertinentes” in a place where another may not enter without leave. A warren must be campestre, and covers pheasants and partridges as well as conies; but grouse are not birds of warren. *Devonshire v. Lodge* (1827), 7 B. & C. 36.

The case which is most quoted in the old text-books is *Moyle v. M.* (1599), Owen 66, Noy 70: “The Court held it was not w. to destroy coney-borrows, for w. will not lie for conies, because a man hath not inheritance in them, and a man can have no property in them but only possession, and although by a special law keepers are to preserve the land they keep, in the same plight they found it, yet this does not bind every lessee of land.” Alias, if the land be a warren by charter or prescription, Co. Lit. 53 *a*, note; 8 Bacon 383. So 2 Rolle Abr. 815 (12 & 15). “If a lessee plough land stored with cunicles, this is not w. unless it be a warren by charter or prescription,” when they are considered in law as part of the inheritance, and called “Heirlooms.” Cruise, Dig. tit. iii. c. 2, ss. 22, q. v. “If the tenant of a dove house, warren, park, vivary pools, or such like take so much that so much store is not left as he found at the time of the demise, it is w.,” *ib.* Cf. 22 Viner, p. 438. In any case in which damage to the reversion is proved, an action would lie therefor. Thus it was said in *Hannam v. Mockett* (1824), 2 B. & C. 934, that “hawks, falcons, swans, partridges, pheasants, pigeons, wild ducks, mallards, teals, widgeons, wild geese,

black game, red game, bustards, and herons are all recognised by different statutes as entitled to protection, and consequently in the eye of the law are fit to be preserved." So of doves and rabbits, but not of rooks, which were not then known or alleged to be articles of food, and are harmful. (But rook-pie is now a well-known article of diet.) As to swans, see *The Case of Swans*, 7 Coke 156. The erecting of a dove house is not a common nuisance, but an action will lie by those whose corn they eat. *Dewell v. Sandars* (1619), Cro. Jac. 496; cf. *Arnold v. Jefferson* (1698), 3 Salkeld 247. The law is the same as to rabbits. *Dewell v. Sandars*, disapproving *Boulston v. Hardy* (1597), Cro. Eliz. 547, 5 Coke 105. So when a landlord or his sporting tenant overstocks the land with game, the tenant has his remedy. *Farrer v. Nelson* (1885), 15 Q. B. D. 258, and cases there cited.

Demise as Land.—In *Lurting v. Conn* (1850), 1 Ir. Ch. R. 273, lands were sub-leased by plaintiff to defendant, the latter signing the following memorandum, endorsed on the lease: "Before signing hereof I do hereby during this demise grant to the said (plaintiff) the number of twenty pair of rabbits' flesh yearly during this demise." The question as to if and how much the warren had been tilled was undecided, but Cusack Smith, M.R., said: "If a lease was made of a rabbit-warren as a rabbit-warren, the tenant might, perhaps, be considered as precluded from ploughing or destroying it. . . . But in this case the warren is demised as land." *Angerstein v. Wood* (1801), 6 Vesey 487, was cited, where, however, the grounds on which the injunction was granted do not appear. See as to demising a meadow as a meadow, *supra*, p. 19. See now The Ground Game Act, 1880, 43 & 44 Vict. c. 47.

FISHPONDS AND DEER PARKS.

It was said *arguendo* in *Moyle v. M.* (1599), Owen 66: "If lessee of a pigeon house stop the holes, so that the pigeons cannot build, w. doth lie, as it hath been adjudged. Also if lessee of a hopyard plougheth it up and sows grain there, it is w., as it hath been adjudged. Also the breaking of a weir is w., and so of the banks of a fishpond, so that the water and fish run out; to all which the Court agreed." It is w. to remove dovecots and presses, if affixed to the freehold. *Kimpton v. Eve* (1813), 2 V. & B. 349. (See as to the right to remove fixtures generally, *infra*, p. 118.) (*j*)

Any man may erect fishponds, these "being a matter of profit, and increase of victuals." 2 Inst. 199. The fish pass as parcel of the inheritance, *infra*, unless they belong to one with only an estate for years. See Williams on Executors.

Deer, &c.—In Co. Lit. 53 *b* we read: "If the tenant of a dove house, warren, park, vivary, estangues, or the like, do take so many, as such sufficient store be not left as he found when he came in, this is w.; and to suffer the pale to decay, whereby the deer is dispersed, is w." And in 2 Blackstone 428, it is said that "Deer in a real authorised park, fishes in a pond, doves in a dove house, &c., though in themselves personal chattels, yet they are so annexed to and so necessary to the well-being of the inheritance, that they shall accompany the land wherever it vests, either by descent or purchase."

"This is understood of a lawful park, whereunto three things are required: 1, a liberty, either by grant (of the

(*j*) Stealing house doves or pigeons is punishable under the Larceny Act, 1861, c. 96, s. 23; and stealing fish by the same Act, ss. 24, 25. Malicious injury to private fisheries is punishable by the next Act, c. 97, s. 32.

king) or by prescription. 2. Inclosure by pale, wall, or hedge. And 3, beasts, savages of the park." 2 Inst. 199. None can erect a park otherwise, see the *Case of Monopolies* (1602), 11 Coke 87 b. "If I have a manor in which there is a park and fishponds, and I lease the manor, except the game of deer, and the fish, and afterwards I grant over the reversion, the grantee shall have the deer and the fish, as things attendant upon the inheritance," in *Liford's Case* (1615), 11 Coke 50 b.

Deer are only attached to the inheritance and not distrainable, when kept in a legal park for pleasure, as in the old times, and not at all for profit. *Davies v. Powell* (1738), Willes 46. Even in a legal park they cease to be attached to the inheritance and they descend as personal property if they have been reclaimed (whereby also the park ceases to be a legal park), *Morgan v. Abergavenny* (1849), 8 C. B. 768, followed in *Ford v. Tynte* (1861), 2 J. & H. 150, where Page Wood said it was w. to reclaim deer in a lawful park. As to the evidence of reclamation, see the last two cases. And see Williams on Executors, and Tomlin's Law Dictionary, title, Park.

By the Larceny Act, 1861, s. 13, "whoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the inclosed part of any forest, chase, or purlieu, or in any inclosed land where deer shall be usually kept, shall be guilty of felony, &c." The following three sections contain supplementary provisions.

BOTES AND ESTOVERS (*a*).

IN general, the lopping and topping of trees is w. *Samuel v. Johnson* (1547), Dyer 65 *a* ; when not done in the exercise of a right to botes.

Definition.—Spelman says as to Bota seu Bote: “Retinetur hodierno foro in vocabulis, housbote, ploughbote, fierbote; lignum significantia, quod ex indulgentia legis, conductori liceat de conducto prædio succidere et asportare, in aedium, sepium, aratrique sui refectionem, etiam ignis subministrandi gratia.” And as to “Estoverium”: “recentioribus (statutis) solum propemodo in usu est, ad significandum ligna quæ alter in alterius silva seu terra, ex jure capiat, ad foci, ædium, sepium, et agriculturæ suæ sustentationem; vulgo, fyerbote, housebote, hedgebote, ploughbote. Eaque vocis istius est potentia, ut si quis in silva sua, alteri concedat rationabile estoverium, concedi ista omnia intelliguntur.”

“The tenant may take sufficient wood to repair the walls, pales, fences, hedges, and ditches, as he found them; but he can make no new; and he may take also sufficient plowbote, firebote, and other housebote. . . . The tenant may dig for gravel or clay for the reparation of the house, as well as he may take convenient timber trees.” Co. Lit. 53 *b*. And in 41 *b* it is said that “to every tenant

(*a*) 8 Bacon 392; 22 Viner 453; 7 Comyn 655.

for life, the law as incident to his estate without provision of the party giveth him three kinds of estovers, (that is) housebote which is twofold, viz., estoverium ædificandi et ardendi, ploughbote that is estoverium arandi, and lastly haybote, and that is estoverium claudendi, and these estovers must be reasonable, estoveria rationabilia. And these the lessee may take upon the land demised without any assignment, unless he be restrained by special covenant, for *modus et conventio vincunt legem*. Bote in the Saxon tongue, and estovers in the French, in this case are all of one signification, that is, to have compensation or satisfaction for these purposes. Estovers cometh of the French word *estover*. And the same estovers that tenant for life may have, tenant for years shall have." And see *Darcy v. Askwith* (1618), Hobart 234 ; 8 Bacon, p. 385.

So 1 Rolle Abr. 823 ; Co. Lit. 54 b.

"Digging peat is in many places the ordinary bote ; and perhaps the only fruit that can arise from the land." *Wilson v. Bragg* (1742), 8 Bacon 428.

It was held by the whole Court in 21 Hen. 6, 56, that "housebote, heybote, and firebote belong to the termor for years and the tenant for life, whether a lease is made or not ; but they were in different opinions as to the foldebote which was granted by the lease." Broke, W. 89, Fitzherbert, N. B. (59 k) ; and see *Mervyn v. Lyds*, p. 62. The lessee may cut a tree and make a vessel, fixed in the land for watering the beasts in the same land, "which is necessary, because the water is a great way off." 22 Viner, p. 454. It seems that if a tenant exceeds his right to reasonable estovers, he may be restrained by force. Bracton iv. c. 34, fol. 217 a. A tenant cannot use wood to enlarge the house, nor where wood was not used before. 22 Viner, p. 456.

Of what Wood?—In exercising the rights to botes, care should be taken to employ only that species of wood which is applicable to the immediate purpose, and to select the inferior woods first; as Bosanquet, J., said in *Simmons v. Norton* (1831), 7 Bing. 640: “As to the trees, although the tenant may fell them for necessary botes, he must at his own peril select such as are fit for the purpose, and employ them accordingly.” So Co. Lit. 53, “converting trees into coals for fuel where there is sufficient dead wood is w.” 8 Bacon, pp. 385, 394; Fitz. N. B. 59 K. M.; *Cole v. Peyson* (1660), 1 Rep. in Ch. 106. See “Dotards,” *infra*, p. 93.

Again, in 21 Hen. 6, 56, where the defendant sought to justify the cutting of ashes for firebote, it was held that he ought to show that there was no underwood on the land. Broke, W. 89; 8 Bacon 413. Of course, “seasonable wood” (q. v.) can be cut for firebote, whether there is preferable wood or not. Broke, *ib.*; 2 Rolle Abr. 817. In *Anon.* (1572), 3 Leonard 16, it is said that a lessee “cannot take fuel but of bushes and small wood, and not of timber trees. But if the lessor in his lease granteth fireboot expressly, if the lessee cannot have sufficient fuel . . . he may take great trees.” *Sed qu.* as to the first proposition.

“In trespass the question was, whether a copyholder might lop off the bough without a special custom; and it was resolved per curiam, that by the common law he may cut off the under boughs, which cannot cause any w. But the amputation of the top boughs will cause the putrifaction of the whole tree; wherefore it is w. as well as the decapitation thereof,” *Dawbridge v. Cocks*, cited in 22 Viner, p. 445, which shows that loppings must be resorted to before toppings. If a tree stands in or on

the borders of a field, lopping may perhaps also be justified on the ground of good husbandry, so as to give light and air to the field.

“The law is that a termor shall have loppings and shrowdings of trees for necessary fuel.” Dyer 19 *b*. “The lessee has no interest, but to lop them (the trees) and to shade his beast,” per Fineux, J., Broke, W. pl. 143. “The lessee shall have housebote, heybote, ploughbote, hedgebote, although not expressed, but if he takes more than is necessary he shall be punished,” and this “albeit he be not compellable thereunto . . . and the reason is, for that the law doth favour the supportation and maintenance of houses for habitation for mankind.” Co. Lit. 54 *b* and 53 *b*. But where a house is destroyed, “as if the house were burnt by enemies or by tempest, if the termor rebuild it with timber growing upon the land leased, it shall be adjudged w., because he did it of his own head; for the power of the termor to make repairs is only in small repairs, as to make splents, mud-walls, hedges, and ditches, but not in large and principal repairs, as the principal timber, and stone walls, and tiles, but a covering with thatching he may make.” *Maleverer v. Spinke* (1537), Dyer 36 *a*. The latter part of this quotation, limiting the right to repair to very small proportions, is not to be pressed too far. The first part, too, is at variance with Co. Lit. 53 *a*, where it is said: “If a house falls by tempest, or be burnt by lightning, or prostrated by enemies of the king, or such like, without default of the lessee, the lessee may build it again with the same materials that remain, and may cut other timber upon the land to rebuild it.” 22 Viner, p. 453.

Life Tenant.—If a tenant for life will repair, he has the same right as a lessee to resort to timber, &c., for

the purpose. Co. Lit. 41 *b*, *supra*. Thus, in *Bewick v. Whitfield* (1734), 3 P. Wms. 267, a remainderman brought a bill, praying that decaying timber might be cut down and sold and the proceeds paid to him. Talbot, L.C., said: "As to the tenant for life, he ought not to have any share of the money arising by the sale of this timber; but since he has a right to what may be sufficient for repairs and botes, care must be taken to leave enough upon the estate for that purpose; and whatever damage is done to the tenant for life on the premises held by him for life, the same ought to be made good to him." And see *Bagot v. B.* (1863), 32 Beavan at p. 521, where the estate of a wasteful life tenant was allowed credit for timber employed in repairs.

Cost of Felling, etc.—In 5 Ed. 4, 100, where the house was ruinous at the time of the lease, "it is agreed that the termor can cut trees to use in repairing, but he must pay the wages and salary of the workmen at his own cost, and he must not cut wood to pay the wages." Broke, W. pl. 112, 130. So that Romilly, M.R., was wrong in *Bagot v. B.* (1863), 32 Beavan at p. 523, where he allowed for timber in the rough. The allowance should have been for standing timber.

Covenant to repair.—Where a lessor covenants to repair and neglects to fulfil his obligations, the lessee may cut down trees for the purpose. *Anon.* 1 Brownl. 240. Again, "if the lessor by his covenant undertaketh to repair the houses, yet the lessee (if the lessor doth it not) may with the timber growing upon the ground repair it, though he be not compellable thereunto. In the same manner, if a man make a lease of a house and land, without impeachment of w. for the house, yet may the lessee with the timber upon the ground repair the house, though

he may utterly w. it if he will." Co. Lit. 54 *b*; 8 Bacon 393.

But where lessor covenants to repair, the lessee should not take botes without first notifying the lessor to repair. See *Stukeley v. Butler* (1615), Hobart 173.

An express liberty to take botes for reparation does not constitute a condition precedent that there should be sufficient botes. *Bristol, Dean, &c. v. Jones* (1859), 1 El. & E. 484.

A covenant that the lessee may take botes, gives him no more than the law allows. *Archdeacon v. Jennor* (1598), Cro. Eliz. 604.

In Moore 23 is an anonymous case where it was held that a covenant by the lessee to repair, did not prevent him availing himself of his common law right to botes, but this case really went upon the fact that an action on the covenant was no bar to an action of w., in which treble damages were then recoverable; also it was not a case in which an action of w. lay at all. 22 Viner, p. 455. Also a side-note in 8 Bacon 394 says that if the tenant covenant to repair ruinous houses, he can take trees for it, but this is not borne out by the authorities cited.

Trees excepted.—There seems to be a conflict of authority as to a lessee's rights to lop and top where trees are excepted from the lease. In *Rich v. Makepeace* (c. 1618), Noy 29, "Lessee for years, the trees being excepted, has liberty to take the shrowds and loppings for fireboot. If he cut any tree it shall be as well for the loppings as for the body of the tree. By Hubbard and the whole Court without question." But in *Sir Richard Lewknor's Case* (1587), 4 Leon. 162, this is denied, as the property in the trees would be still in the lessor, who could bring trespass and not w. against the tenant if he cut the trees.

22 Viner, p. 455. It is also denied by Ellenborough, C.J., in *Goodright v. Virian* (1807), 8 East 190; and doubtless *Rich v. Makepeace* is bad law. Cf. *White v. Sayer* (1622), Palmer 211, where the tenant alleged a grant of loppings by lord who reserved the trees. A covenant or condition that the lessor may enter and cut is not an exception. *Lushford v. Sanders* (1599), Cro. Eliz. 690.

The simple lease of a wood in which are only great trees, passes no more than the grain and the pasturage (Broke, W. pl. 12), and hedgebote.

Assignment of Botes.—Where a lessee for years was to take hedgeboot by assignment, yet he may take it without assignment; for the affirmative does not take away the power which the law gives him. 22 Viner, p. 455. But see *Talbot v. Woodhouse* (1699), Lutwych 1471. It is otherwise if there is also a negative covenant. Dyer 19 *b*, pl. 115.

Excessive Botes.—It should next be noted that a tenant may only cut sufficient for his immediate purpose; he must not cut excessively and keep a stock of wood by him. 22 Viner, p. 456. But see *Jenkins v. J.*, p. 52.

Thus in *Gorges v. Stanfield* (1598), 2 Cro. Eliz. 593, w. was assigned in cutting down 300 oaks. The defendant as to 200 pleaded that the houses let to him were ruinous, &c., and that he had cut down the oaks to repair those houses; and as to the residue, he cut them down, and was keeping them to employ about reparations, tempore opportuno, &c. “Held by all the Court to be no plea; for if it should, every farmer might cut down all the trees growing upon the land, when there was not any necessity of reparations.”

In *Doe v. Wilson* (1809), 11 East 56, where the tenant had cut down fifteen oaks in April, and at the time when ejectment was brought, in October, only a few of

them had been used in repair, but some buildings were still out of repair, Lord Ellenborough, C.J., observed "that it was a question for the jury to decide, whether the trees were cut down for the purpose of repairing the premises *bonâ fide*, and were in a course of application for that purpose." It should be noted that it is good woodcraft to fell oaks in the spring of the year, when the sap is rising, because at that time the bark, a most valuable product, comes off easier. If cut at another time the landlord may have an action for the value of the bark. *Courtenay v. Fisher* (1826), 4 Bing. 3.

Wood cut for housebote, but proving unfit, must not be converted by the tenant to any other use (22 Viner, p. 456); *qu.* unless it is required for some other bote and there be no preferable wood.

Also, a tenant may only cut in order to use; he may not sell his cuttings in order to buy timber or materials for building. Thus in *Gower v. Eyre* (1815), Cooper 156, a tenant for life sold timber to reimburse herself for outlay in repairs made year after year; but Sir William Grant said: "It is laid down in the books, and particularly by my Lord Coke (Co. Lit. 53 *b*), that a tenant cannot cut down trees for repairs and sell the same; he must use the timber itself in repairs, the sale being *w.*" Cf. *Simmons v. Norton* (1831), 7 Bing. 640. And although he rebuy the same timber before action brought, for the purpose of using it in repairs, it is *w.* Broke, W. pl. 112, 130; Co. Lit. 53 *b*; 22 Viner, p. 454; 8 Bacon, p. 393. But the damages might be merely nominal, *infra*, p. 53. This does not apply to ecclesiastical tenants, who have a right to sell and apply the proceeds. See "Ecclesiastical W."

"If A. hath common of estovers in the wood of B. for housebote, and he cuts down four trees for that purpose,

and in working they prove unfit for the use, as for posts of a house, &c., A. cannot convert this timber to any other use, &c., neither can he sell, or buy other fit wood with the money; and he cannot enlarge the house with this timber, nor board the sides of the barn there which had mud walls or the like before." 8 Bacon, p. 394, citing the *Earl of Pembroke's Case*, Clayton 47, pl. 81.

For use on same Estate only.—"It is the nature of estovers that they are to be taken without assignment, that they take their description as good or otherwise from their application, that they are of utility to the estate itself. In all these views the estovers of one estate cannot be applied to the others. If one is possessed of blackacre and greenacre, and blackacre produces no estovers, if those of greenacre are to be applied to blackacre, the estate must be exhausted." *Lee v. Alston* (1783), 1 Brown, C. C. 194, per Thurlow, L.C.

An action lies against one, even the owner of the land, who takes away wood which has been cut for botes. 22 Viner, p. 455.

Long-continued Abuse.—Where tenants had right of turbary by their leases, but they and their predecessors had cut turves for sale during a period of eighty years, Lord Redesdale said: "Where a tenant abuses a right of estovers by using it for a purpose or to an extent which his lease or tenure does not authorise, it is a proper case for an injunction to be granted by this Court; and no length of abuse will authorise the tenant; for as between him and his landlord, the only mode of ascertaining the right is by the lease or agreement under which the tenant holds. . . . The allowance of the abuse is only by the indulgence and permission of the landlord, and shall never be turned against him by the tenant." *Courtoun v. Ward*

(1802), 1 Sch. & Lef. 8; cf. *Congleton v. Mitchell* (1848), 12 Ir. Eq. R. 34, where there was a dispute as to title; *Elias v. Griffith* (1878), 8 Ch. D. 525; *Burrowes v. Hayes* (1834), Hayes & Jones 597. As to rights of turbary on the land demised, see pp. 44, 53.

Rights of Common.—"If a man have common of estovers in the woods of another, and he who is tenant and owner of the wood cut down all the wood, he who ought to have the estovers shall not have an action of w., but shall have an assize of his estovers." Fitzh. N. B. (59).

"If a lessee cuts housebote in a place where other have common this is w., for it is evident disinheritance, because they cannot grow again." 2 Rolle Abr. 819; 46 Ed. 3, 13.

Royal Grant.—In *A. G. v. Stawell* (1795), 2 Anst. 592, a royal grant by letters patent of the office of forest ranger, and "to have all manner of wood blown or thrown down by the wind, and all dead wood, and the boughs and branches of trees and wood in the said forest cut off or thrown down, and housebote and firebote for himself and the foresters and keepers," was held not to give the ranger a right to lop and top trees that were felled; also, that a tenant who holds merely by virtue of an office is not entitled to botes.

Grant of Annual Quantity.—With these cases should be compared that of *Jenkins v. J.* (1618), Noy 23, where the usual Common Law rights were modified by the lease. The defendant justified the cutting of trees on the ground that they were to make a fence with pale. "And by Hubbard, that it was good without showing that the fence was made of pale, &c., and now in decay. Note, where hedgeboot or paleboot are granted to be taken reasonably, and where certain loads of trees are granted annually for

that purpose, here it is not necessary to show that the fence is in decay. And note, that for fireboot it is not necessary at the time of the cutting to show the necessity, and so for reparation. For it is reason and good husbandry to cut them in some convenient time beforehand. And note the difference, because that which is allowed certainly at some years may not be sufficient."

Grant of Lop and Top.—A husband in order to provide a jointure for his wife covenanted to stand seised of lands to the use of himself for life, remainder to the use of his wife for life, and then to the use of his son, the defendant in fee, "except all trees on the land, but that his wife should have the lopping and topping of the trees." After his death the son cut five oaks, living the wife, whose second husband brought his action on the case for felling the trees to the prejudice of the power to lop and top; and the action succeeded notwithstanding several defences, one of which was that the defendant had left sufficient trees for the purpose named. *Tregonell v. Rives* (1635), Jones 376.

Pleading.—Where a defendant wishes to set up the defence that he applied the timber in repairs or has bought and applied other timber with the proceeds of the timber cut, he must specially plead the fact, *Simmons v. Norton* (1831), 7 Bing. 640; and see further as to mitigation of damages under "Meliorating W.", p. 142.

Damages.—"In an action for cutting down trees excepted out of a lease, it may be shown in mitigation of damages, that the trees were applied towards purposes for which the plaintiff had covenanted to furnish timber by assignment of his bailiff, if there were sufficient timber on the demised premises. Or that they were exchanged for other timber used for those purposes." Abbott, J., in

Rennell v. Wither (1818), Manning's Index of Cases, p. 291.

Turf.—By the Landlord and Tenant (Ireland) Act, 1860, 23 & 24 Vict. c. 154, s. 29, “where any lease or demise shall be made on or after the first day of January, 1861, of lands containing turf bog, unreclaimed and unprofitable for agriculture, or where any lease shall be so made giving a right of turbary on the premises, or conferring a right of common of turbary on premises not comprised in the lease, it shall be lawful for the tenant, unless by the said lease it be specially provided to the contrary, to cut, use, and enjoy the said turf bog, so far as shall be necessary for the bonâ fide use on the demised premises of the tenant and his lawful sub-tenants, but not for any purpose of trade or manufacture, or for profit or sale, unless the right so to use and enjoy the same shall have been expressly granted in writing by the landlord being competent so to grant as aforesaid.”

Topping and Lopping Trees (Ireland).—By s. 31, 23 & 24 Vict. c. 154 (1860), “no tenant of any lands holden under any lease or other contract of tenancy conferring an estate or interest less than a perpetual estate or interest, and made on or after the first day of January, 1861, shall cut down, top, lop, or grub any tree or wood growing on the said lands, unless such tenant shall be authorised thereto by covenant or agreement in the lease under which the lands are holden, if there be a lease, or unless such tenant shall have the previous consent in writing of the landlord competent to give such consent for that purpose, or shall have been lawfully required so to do, under a penalty not exceeding five pounds for each tree cut down, topped, lopped, or grubbed, to be recoverable by the immediate landlord by civil bill action

in the county in which the tenant usually resides, or in the county in which the lands or any part of them are situate, at the election of the landlord ; provided that nothing in this provision contained shall affect any right which any tenant may lawfully exercise or enjoy in respect of trees duly registered and belonging to such tenant, or in respect of willows, osiers, or sallows, under any Act in force in Ireland." This proviso refers to the Timber Acts, see Index.

LIBERTY TO TAKE TIMBER, ETC., FOR REPAIRS.

It often happens that testators give their devisees for life liberty to apply the timber on the estate in repairing the devised property, without coupling therewith any liability. In such cases it is necessary to examine closely the words of the will in order to see whether the devisee must use the actual timber or may sell it and apply the proceeds.

The most recent case, an important decision, is that of *Birch-Wolfe v. Birch* (1870), 9 Eq. 683, where all the limitations were by way of legal use. An action was brought against the representatives of two deceased tenants for life, founded on the fact that they had sold timber. The will contained the following clause : " Provided also, and I do hereby further declare, that it shall be lawful for the said Richard Birch, and the several other persons who shall become beneficially entitled to my said estates under the limitations aforesaid, as and when they shall respectively come into the possession thereof, from time to time to fell and convert such timber and woods . . . (except the ornamental timber and trees in and about my mansion of Woodhall) as may be necessary for the repairs of the said estates." As regards the first

tenant for life, the Court (Sir W. M. James, V.C.) came to this conclusion: "When all the facts and circumstances come to be known, they amount to this: that during a period from the year 1838 to the year 1854, that is to say, during a period of sixteen years, there were cuttings which would, after making deductions in the account for cuttings of wood which clearly was not timber, amount to considerably less than £1,000, being cuttings on an average of something more than fifty or sixty pounds a year. That is not very considerable. Then there is this evidence, that during this period the same man who is making these cuttings of timber (which having regard to the evidence before me as to the nature of the estate, and that it is absolutely crowded with timber at this time, appear to me to be of the most trivial character, though one or two of the earlier ones were rather larger) was himself laying out very considerable sums of money in repairs, improvements, and in additions to the buildings, and even in timber repairs to this extent, that he is alleged to have kept two carpenters in constant employment during almost the whole period. . . . I am of opinion, therefore, that it is not fitting that this Court should interfere upon what appears to me to be a trifling ground of complaint, if any ground of complaint there be, with respect to all that took place during the lifetime of the first tenant for life. . . .

"With respect to the second tenant for life, it appears to me that the same principles apply to all the earlier circumstances which took place in the lifetime of that tenant for life. It appears to be the fact that he also has been making repairs to a considerable extent. He has paid a sum of £210 towards dilapidations which existed at his death, and with regard to which, as far

as I can make out, he was under no legal liability whatever. I think, therefore, that as to all which was received in his lifetime, the bill fails in exactly the same way as it fails against the last tenant for life." Cf. the ordinary rights of a tenant for life to repair out of the timber on the estate, p. 46.

Construction.—Where a testator devised his real estates in settlement and bequeathed his personal estate in a different manner, and added a direction "That the timber or wood which should be upon his real estates, or any of them, should from time to time be made use of for repairing the houses thereupon, or otherwise for the benefit and advantage of his estate, or that the same should be sold, and the money arising from the sale thereof should be applied in the same way as his personal estate was directed to be applied," it was held by Leach, V.C., first, that the direction did not apply to underwood, which was by its nature unfit to be used for the repair of the houses, and second, that the trustees of the real estate were entitled to cut timber, not standing for shelter or ornament, they leaving sufficient upon the estate for repairs. *Butler v. Borton* (1820), 5 Madd. 40. However, in *Silvester v. Bradley* (1842), 13 Sim. 75, on the same will, Shadwell, V.C., held that the trust for cutting timber ceased on the inheritance vesting in possession in an adult person.

UNDERWOOD.

Underwood.

Trees cut for benefit of Underwood.

Hedges. Bushes.

Boundaries.

IN this section it is intended to treat only of underwood as popularly understood, leaving to the next section the treatment of those woods of larger growth which are cultivated and cropped in the same way as underwood, and which constitute *Silva Caedua*, commonly so called.

Definition.—Underwood (*a*) proper has been sufficiently defined in *R. v. Ferrybridge* (1823), 1 B. & C. 375, where Bayley, J., said: "Generally speaking that term is applied to a species of wood which grows expeditiously and sends up many shoots from one stool, the root remaining perfect from which the shoots are cut, and producing new shoots, and so yielding a succession of profits," and then only

(*a*) "Saleable underwoods" within the meaning of 43 Eliz. c. 2 are "all woods that are so treated as to produce periodical profits from the same stools and roots," per Lush, J., in *Fitzhardinge v. Pritchett* (1867), 2 Q. B. 135; "small wood never likely to be used for timber, may be called underwood; so may plantations of timber trees, not intended for permanent growth, but to be cut at stated intervals for use as hop-poles,

or for other similar purposes," *R. v. Narberth North* (1839), 9 A. & E. 815; "such as are intended or destined for sale, in contradistinction to such as are to supply the land with estovers for fuel or other purposes of the estate," *R. v. Mirfield* (1808), 10 East 219; and see *Walton v. Tryon* (1751), Ambler 130, *Aubrey v. Fisher* (1809), 10 East 446. The law as to rating underwoods is now governed by the Rating Act, 1874.

when treated as underwood. "It would be a perversion of language to call (horse chestnuts, limes, plane trees, and aspens) underwood," *ib.*

The following trees sprout again after being felled or lopped and topped: oak, ash, hazel, chestnut, beech, birch, willow, hornbeam, poplar, maple.

The following trees do not sprout again: elm, larch, fir, pine, sycamore, plane.

General Principle.—It is hardly necessary to refer to any authorities for the proposition that underwood may be cut and carried by any tenant who is entitled to appropriate the ordinary crops of the land (*Broke, W. pl. 26*), subject, however, to the proviso that the crop may only be cut in the year in which it is considered to be ripe, regard being had to the custom of cropping on the estate, and in default of such custom to the course of cropping in the locality.

Time for Cutting.—The year in which by custom underwood is considered to be ripe, is approximately fixed by the purposes for which the crop is generally used; thus, if used for firewood, fewer years would elapse before it would be ripe than if it were used for hop-poles or hurdle-making. An injunction will be granted to prevent cutting of insufficient growth. *Brydges v. Stephens* (1821), 6 Madd. 279; and see *Hole v. Thomas* (1802), 7 Vesey 589.

Not affected without very clear Words.—This right to cut and appropriate underwood will not be taken away by any but very clear words, as the right is the common law incident to the estate; thus in the case of a devise for life "with full liberty to cut timber and underwood for repairs, or for own use in fuel or otherwise, but not to sell," there being no provision as to the consequence of selling, it was held that the tenant for life was not

deprived of her right by what could only be interpreted as a recommendation; and further that in any case she was not accountable to the next tenant for life in remainder. *Pigot v. Bullock* (1792), 1 Ves. J. 479.

Again, a devise to trustees coupled with a direction that the "timber or wood" should be used for repairing the houses or otherwise for the benefit and advantage of the estate, or that the same should be sold and the proceeds applied as personal estate, has been held to apply only to the timber or wood to which the tenant for life would not be entitled, and therefore not to the underwood. *Butler v. Borton* (1820), 5 Madd. 40, per Sir John Leach. So in *Cowley v. Wellesley* (1866), 35 Beav. 635, underwood was decided to belong to the tenant for life, although directions were given that the trustees should cut timber and underwood from time to time in the usual course for sale or repairs or otherwise. Per Romilly, M.R.

Windfall.—Where coppice is blown down by a storm, the tenant for life is entitled to it absolutely, apparently without regard to the question whether it is ripe or not. *Bateman v. Hotchkin* (1862), 31 Beav. 486.

Injury to Underwood.—In *Gage v. Smith* (1614), Godbolt 289, "It was holden that it is not w. to cut quickset hedges, but it shall be accounted rather good husbandry, because they will grow the better. It was agreed that if a man have underwoods of hazell, willowes, thornes, if he useth to cut them and sell them every ten years; if the lessee fell them, the same is no w.; but if he dig them up by the roots, or suffereth the germinds to be bitten with cattel after they are felled, so as they will not grow again, the same is a destruction of the inheritance, and an action of w. will lie for it. But if he mow the stocks

with a wood-sythe, the same is a malicious w.; and continual mowing and biting is destruction." 2 Rolle Abr. 818; Co. Lit. 53.

"The destroying of germens when the tenant cuts an underwood is w., for he ought to preserve them." 22 Viner 444; Co. Lit. 43; *Darcy v. Askwith* (1616), Hobart 296. So if he suffers the germens to be destroyed after felling timber. Viner, ib.

Cutting the stocks of underwood is w., "for the spring cannot grow." Broke, W. 91, 112. "This underwood is a thing of inheritance and perpetuity, for after every cutting down, they will grow again from the stubs." *Hoe v. Taylor*, Croke Eliz. 413; 4 Coke 30 b. "If a man cut trees and then suffer the germins to be destroyed, this is a double w." 2 Rolle Abr. 818. "If a lessee or his servants suffer a wood to be open by which cattle enter and eat the germins, although they grow after, still this is w., for after such eating they will never become great timber, but shrubs." lb. 815.

Where Reproductive Trees cut by Lessor.—If trees are not excepted from a lease and the lessor cuts them, the lessee is under no obligation to inclose so as to protect the sprouting underwood from his cattle. *Anon.* (1561), Moore 9.

In *Clithero v. Higgs* (1637), Jones 388, Queen Elizabeth leased the manor of D—, in the county of Oxford, to Sir John Fortescue, "except all trees and timber." Part of the manor was a large close, of which some portion was in pasture, while a great portion was "great wood." The lease contained a grant of the herbage, and this was used by the farmer for feeding his beasts. King James sold the trees and they were cut down, and afterwards he granted the roots and stocks that they should be

grubbed up. The farmer put in his beasts to feed in the pasture, and they fed sometimes on the little germins which commenced to grow in the close. The Court was against the plaintiff, "for the herbage and feeding belong to the farmer. The lessor by cutting the great trees so that he could not use his right of pasture without consumption of the germins, it is lawful for him."

In *Moore* (1549), No. 34, is a case in which a lessor sued a lessee for w. in letting his cattle eat the springs growing from the stools of trees, which the lessor had not reserved in the lease, but had nevertheless cut down during the term. It was held, however, that the cutting was wrongful, and that it was therefore unreasonable to compel the lessee to fence the stools from his cattle (see p. 61). And see also *Mervyn v. Lyds* (1553), 1 Dyer 90 a, as to the inability of a reversioner to fell during the term trees which have not been excepted, the "special property" being therefore in the lessee. *Herlakenden's Case* and *Liford's Case*.

"If a man lease a close and an underwood, and between them there is a quickset hedge, so that the beasts put in the close cannot come into the underwood; if the lessor cuts and carries away all the quickset hedge, by which the beasts put into the close enter the underwood, and there crop the germins, by which their roots become aridæ et siccæ, this act of the lessor shall excuse the lessee, so that he is not punishable for this w." *Palmes v. Page*, quoted in 2 Rolle Abr. 822.

In *Rogers v. Price* (1849), 13 Jur. 820, where an interim injunction was continued, with liberty for the plaintiff to bring an action for damages within a year, and in default, the bill to stand dismissed with costs. And in *Hanson v. Gardiner* (1802), 7 Vesey, at p. 310, Eldon,

L.C., said : " Where a common runs through a wood, it is well known that the cattle pick up a great deal in the glades ; and if damage is done thereby to the young wood, it is not injury, for it is the consequence of the right."

Disputed Title.—An injunction will not be granted against cutting down underwood where there is a *bond fide* dispute as to title, and where the defendant is cutting in the course of the proper management of the estate, as the plaintiff will be sufficiently compensated by damages. *A. G. v. Hallett* (1847), 16 M. & W. 569.

Local Custom.—In the vale of Severn there is a custom for the tenant to crop pollards and underwoods in the last year of his tenancy ; and in the Weald of Kent compensation is paid for all underwood and pollard-tops growing in the last year. Bund's Agricultural Holdings Act, pp. 54, 67.

Mortgagor and Mortgagee.—A mortgagee who is out of possession has no right to restrain a mortgagor from cutting underwood merely because the security is deficient ; for underwood is a crop and may be carried like any other crop. But if it be shown that the mortgagor is cutting or threatening to cut otherwise than in a husbandlike manner, at the usual seasons, or of the usual growth, or if it be shown that he is a bankrupt, an injunction will be granted. *Humphreys v. Harrison* (1820), 8 Vesey 581 ; and see *Hampton v. Hodges* (1803), 1 J. & W. 105. As to timber, see chapter on Mortgagor and Mortgagee.

THE RIGHT TO CUT TIMBER FOR THE BENEFIT OF UNDERWOOD.

The authorities on this subject are few but sufficiently distinct, and go to show that where underwood

is cultivated as the profitable crop, it is not w. to cut down timber which interferes with its growth. It is well known that in the neighbourhood of cities and large towns, it is much more profitable to grow underwood than timber, from the great demand which always exists in those places for fire-wood and small wood capable of being applied for numerous useful purposes which it is superfluous to specify. These considerations seem to have been applied in *Knight v. Duplessis* (1715), 2 Vesey 360, where Lord Hardwicke granted an interim injunction to restrain w. by the defendant who was in the position of a private receiver of the rents and profits of land for the benefit of an infant, who was entitled absolutely on attaining the age of twenty-one or marrying with consent under that age, subject to a gift over to the plaintiffs in the event of her not attaining that age or so marrying. He said: "It is going too near the wind for such a guardian or trustee to cut down timber on a suggestion that it will not improve. There is a great variety of judgment upon that, which will admit of no dispute. On the other hand it is not to be said the cutting down such wood is w. on the estate. Timber growing among underwood must be cut down not to prejudice the underwood, that it may thrive, especially in an estate so near London where underwood bears a great price; however, it is too much for such a trustee to do, and there is no harm in granting an injunction to stay w. which is submitted to." Lord Eldon cited this case with approval, saying in *Burges v. Lamb* (1809), 16 Vesey 174: "It is not w. to cut timber where necessary for the growth of the underwood in which it is situated." This was said in that portion of the case in which an injunction was continued against all and any cutting by the tenant for life of a

timber estate, alleged to have been improperly purchased by trustees under a power. And in a case in which a remainderman sought to restrain the cutting of ornamental timber by the tenant for life without impeachment of w., Wood, V.C., said : "The undergrowth is much encouraged, and therefore the growth of large trees is not desirable, as that would spoil the underwood." *Halliwell v. Phillips* (1858), 4 Jur. N. S. 607.

BUSHES AND HEDGES.

Not only may the tenant cut underwood that is growing as such, *i.e.*, in a wood or under great trees, but he may also cut the reproductive bushes which grow sparsim on his land, and the hedges (10 Hen. 7, No. 3). Thus it is said in a note to Dyer 35 *b*, that it was held by Coke, C.J., and the Court, that "w. cannot be assigned in cutting down and selling whitethorn, unless (*b*) it be specially counted that they are within the view, or for the safeguard of the house, or in a field of pasture for shade, and nurture of the beasts; but eradicating or unseasonably cutting them is w. And so of underwood which is not w. of itself." Broke, W. pl. 143; 2 Rolle Abr. 819. See "Equitable W.," p. 166.

Pollard Willows.—We may next refer to *Phillips v. Smith* (1845), 14 M. & W. 589, where a tenant from year to year was sued for cutting down close to the ground, pollard willows growing by a brook, but not shown to be "serviceable either as a defence or support of the bank against the water, nor were they standing so as to be a protection to the house demised." The judgment of the

(*b*) In these following instances, the action of w. would probably not have lain, but an action on the case.

Court was delivered by Alderson, J., who said : " So likewise, cutting even of oaks or ashes, where they are of seasonable wood, *i.e.*, where they are cut usually as underwood, and in due course are to grow up again from the stumps, is not w. . . . [These willows] are not timber trees, and when cut down they are not, so far as appears by the evidence, destroyed, but grow up again from their stumps, and produce again their ordinary and useful profit by such growth ; therefore, neither is the thing demised destroyed, nor is the thing demised changed as to the inheritance, for profit remains, as before, derivable from the reproduction of the wood, from the stump of the willow cut down." Rolfe, B., during the argument had said : " In the case of a fir-tree, I should say the cutting it down to the ground would be w., because it will not grow again." (See as to larches, *Harrison's Trusts* (1884), 28 Ch. D. 220 C. A.) The case seems to have been framed on bad husbandry, but argued and decided on the question of w.

The case of *Barret v. B.* (1628), Hetley 36, is often referred to, and was under a will by which a house and land was left to the defendant for life, on condition that she should do no w., and if she did, that she should pay double the value of the w. The plaintiff brought an action of debt for cutting various trees, but the Court would only allow his right as to timber, for which alone the old action of w. lay. But this case is not of much value now except for the words of Richardson, C.J., when he said : " The law will not allow that to be w. which is not any ways prejudicial to the inheritance."

Hedges.—The general property in hedges is in the tenant, and he may cut them (*Broke, W.* 94), either as a crop, or as is best for the husbandry of his farm ; *e.g.*, in some situations and for some agricultural purposes it is

well to keep the hedges low, so that it would be permissible for a tenant under those circumstances to lower a hedge or to "lay" one which had previously been allowed to grow tall.

Destruction.—But stubbing up or eradicating a hedge is w., and so is suffering it to be destroyed by cattle, etc. Co. Lit. 53 a. See *supra*, p. 60.

In *Gage v. Smith* (1614), Godbolt 209, "It was resolved, That the eradicating of white thorn is w., but not of black thorn, according to the books in 46 Edw. 3, and 9 Henry 6, but if the black thorn grow in a hedge, and the whole hedge be destroyed, the same is w., by Cook, C.J.", and see Dyer 35 b.

Property in Cuttings.—In *Berryman v. Peacock* (1832), 9 Bing. 384, a hedge had been cut by a stranger, as was alleged, unskilfully, and his acts had been adopted by the tenant. The plaintiff landlord brought an action against the stranger for trespass *de bonis asportatis*, but failed, Tindal, C.J., saying: "According to the old authorities, the general property in trees is in the landlord, and the general property in bushes is in the tenant; although, if he exceeds his right, as in grubbing up or destroying fences, he may be liable to an action of w. We should be introducing a distinction never drawn before, if we were to decide that, when a tenant cuts rather more than he ought, the property in bushes so cut passes to the landlord." Gaselee, J., said: "The tenant has the general property in the cuttings of a hedge, whoever cuts it. If by his permission a stranger cuts improperly, so as to damage the fence, that may give the landlord a ground of action on the case, but the property in the cuttings is in the tenant."

In *Bryan v. Dunn* (1872), 7 Ir. R. Eq. 143, it was

said by Chatterton, V.C.: "It is quite settled that the tenant is entitled to cut the hedges on his holding, and that the property in the bushes cut by him is his. . . . The mere cutting of a hedge in such a manner that it will grow again is not w.; but grubbing up the thorns of which it is composed, or allowing the germins to be destroyed by cattle, or cutting them so unseasonably or improperly as that they will not grow again and replace what has been cut, is w. The plaintiffs here were driven to an attempt to prove that it was w. to cut the thorns so near to the ground; and indeed one witness goes so far as to condemn the cutting of them with a saw, instead of a hatchet or hedge knife, neither, however, saying that the cutting of these hedges had destroyed them, or that they will not grow again, but only giving their opinions that the shoots would be stronger if cut according to their ideas. . . . The Court will not go into the consideration of these different modes of operating."

Local Allowances.—An outgoing tenant in Glamorgan-shire will be allowed for trimming a hedge within one year of the operation; and on "laying" a hedge, full value for the first year, two-thirds for the second year, and one-third for the third year. Bund's Agric. Hold. 139.

Melioration.—"Perhaps the termor may root up bushes, furze, and thorns growing upon the land, for melioration, for that is good husbandry, and the Common Law gives such things to the termor for fuel." *Maleverer v. Spinke* (1538), Dyer 37 *a*. "It was not w. to cut thorns, unless they be in a wood, stubbed and digged up by the roots; but if they grow upon the land then they may be stubbed, and it is no w.; but to cut down thorn-trees that have stood for sixty or a hundred years, it is w." *Moyle v. M.*

(1599), 1 Owen 66. But felling old thorn-trees growing sparsim, though not within the old action of w., is not justifiable unless for some good cause, *e.g.*, good husbandry, but an action for damages would lie by the reversioner. And in some districts there is an allowance by custom for grubbing up trees and fences. Bund, Agr. Hold. Act, 1887.

Repair of Fences by Agricultural Tenant.—A tenant on entering into occupation of agricultural land, undertakes to use the premises in a good and husbandlike manner according to the custom of the country, apart from any covenant he may enter into, and as part of his obligation he may be bound to keep the fences in repair, but as regards his landlord, to the extent of the use of proper wood on the premises, or further: *cf.* *Whitfield v. Weedon* (1772), 2 Chitty 685. He is liable to be sued by his landlord and by any stranger who is damnified by non-repair (c). The landlord who is not an occupant can only be sued by a stranger if he has expressly contracted to repair (*Cheetham v. Hampson* (1791), 4 Durn. & E. 318, 2 H. Bl. 350); or where the non-repair was in existence at the commencement of the tenancy (*Sandford v. Clarke* (1888), 21 Q. B. D. 398); modified as to a weekly tenancy by *Bowen v. Anderson* (1894), 1 Q. B. 164. The occupier's duty would not apply to a tenant of land not agricultural, *e.g.*, of a house, garden, and meadow, *cf.* *Johnstone v. Symons* (1847), 9 L. T. 535. See "Estovers," p. 43; "Tenant in Common."

New Fences.—It is w. to make new fences where there were none before (Co. Lit. 41 *b*, 53 *a*; Dyer 332); but

(c) So an occupier, who is only tenant at will, is liable to indiotment for nuisance, *e.g.*, for a house being ruinous and likely to fall down. *R. v. Watts* (1704), 2 Ld. Raymond 856; 1 Salk. 356.

this proposition is not generally supportable now, and by the Agricultural Holdings Act, 1883, when they are made with the previous written consent of the landlord, the tenant is entitled to compensation. Sch. 1 (9).

Construction.—On construction of a lease, it was held that landlord was entitled to all wood, including bushes, and that tenant could have none for repairs, until assigned in pursuance of covenant in that behalf. *Jenny v. Brook* (1844), 6 Q. B. 323.

Miscellanea.—As to prescriptive obligation to repair a fence for the benefit of neighbouring property, see note (b) to *Pomfret v. Ricroft*, 1 Wms. Saunders 559; *Lawrence v. Jenkins* (1873), 8 Q. B. 274. Even a landlord retaining adjoining land in his own hands is not bound to fence against his tenant's cattle. *Erskine v. Adeane* (1873), 8 Ch. 756.

The expense of fencing waste land acquired by trustees of settled property, is a capital charge. *Cowley v. Wellesley* (1866), 1 Eq. 656.

The Act for the Preservation of Woods (1543), 35 Hen. 8, c. 17, contained provisions for fencing against cattle and deer after cutting timber or underwood. This was made perpetual by 13 Eliz. c. 35, repealed by 7 & 8 Geo. 4, c. 27, s. 1 (1828).

22 Ed. 4, c. 7 (1482), gave leave to owners of woods within the royal forests to inclose for seven years after cutting.

Generally as to hedges and fences, &c., see Hunt on Boundaries.

BOUNDARIES.

Duty of Tenant owning Adjoining Land.—A tenant for life or a tenant under a landlord, who has lands of his

own immediately adjoining, is under an obligation to maintain the boundaries which divide the lands from each other, and this whether the actual physical boundary be on his own land or not; and this obligation may be enforced during or at the close of his limited interest.

The earliest case usually referred to (*d*) is *A. G. v. Fullerton* (1813), 2 V. & B. 263, where the defendant and his predecessors had been tenants of charitable lands, and had without fraud removed the boundaries. An injunction was granted against cutting trees and proceeding in an ejectment action, until it could be settled amicably or by commission what land belonged to the charity: otherwise the value of the charity land was to be ascertained, and an equally valuable quantity of the tenant's land set out instead of the original. Lord Eldon said: "It has long been settled, and that law is not now to be unhinged, that a tenant contracts among other obligations resulting from that relation, to keep distinct from his own property during his tenancy, and to leave clearly distinct at the end of it, his landlord's property, not in any way confounded with his own." So in *Speer v. Crawter* (1817), 2 Mer. 410, Plumer, V.C., in deciding that the confusion had not taken place by the fault or neglect of the tenants, said that both Lord Northington (*e*) and Lord Thurlow had expressed an opinion that consent was the ground on which the jurisdiction had been at first exercised. "The next step would be to grant the commission on the application of one party who showed an equitable ground for obtaining it; such as, that a tenant or copyholder had destroyed, or not preserved the boundaries between his own property and that of his lessor or lord. And to its

(*d*) Cf. *Grierson v. Eyre* (1804), 9 Vesey, p. 345.

(*e*) *Wake v. Conyers*, 2 Cox 360; 1 Eden 331.

exercise on such an equitable ground, no objection has ever been made. But on what principle can a Court of Equity interfere between two independent proprietors, and force one of them to have his rights tried and determined in any other than the ordinary legal mode in which questions of property are to be decided?"

Perhaps the leading case on this subject is *A. G. v. Stephens* (1855), 6 De G. M. & G. 111, where a claim on behalf of the poor of the parish of Roehampton was not proved. Cranworth, L.C., said: "The relief thus asked is founded on misconduct analogous to a breach of trust on the part of the defendant, or those to whom he has succeeded. Where a tenant of land for life, or for years, or at will, has land of his own adjoining to that which he so holds as tenant, it is his duty to keep the boundaries between them clear and distinct, so that at the expiration of the tenancy the reversioner or remainderman may be able without difficulty to resume possession of what belongs to him. [He then stated the nature of the relief.] This relief is given not only against the party guilty of the neglect, but also against all those who claim under him, either as volunteers or as purchasers with notice." Cf. *Brown v. Wales* (1872), 15 Eq. at p. 147.

During the Term.—In *Spike v. Harding* (1878), 7 Ch. D. 871, Fry, J., held that the obligation applied during the term as well as at the end, and that even if the tenant proved that the old boundary was situated on his own land, he must still maintain an "actual physical boundary," though not necessarily the old one (in this case a ditch and bank).

Copyholds.—In *Leeds v. Strafford* (1798), 4 Vesey 180, Loughborough, L.C., directed a commission to issue to ascertain the boundaries of copyhold lands, of which

the last tenant had been admitted more than a hundred years before; and this was followed in *Searle v. Cook* (1890), 43 Ch. D. 519 C. A., where the Court said: "It is the duty of a copyhold tenant to preserve the boundaries of his tenement." On enfranchisement, reserving a rent-charge, the lord can have the boundaries set out under s. 24 of the Act of 1852, 15 & 16 Vict. c. 51, and if he omits this, he can subsequently bring his action on showing that the rent-charge issues out of land in the possession of the defendant. "When that is made out, if, by reason of the uncertainty of the position of the particular land or otherwise, the ordinary remedy by distress cannot be resorted to, and no sufficient relief can be had without the assistance of equitable jurisdiction, the Court will assist, but cautiously and with reluctance, especially where the amount of the rent-charge is small compared with the costliness of the contemplated proceedings." Enfranchisement otherwise relieves a copyhold tenant from the duty of maintaining boundaries, except where they have been previously confused.

Heriots and Reliefs.—No action will be entertained to set out the boundaries of land, in respect of which money payments in lieu of heriots and reliefs are due, unless there is also a custom of distress for their recovery, which would make the ascertainment of boundaries necessary. *Basingstoke &c. v. Bolton* (1852), 1 Dr. 270.

Evidence.—It is not material to show that the boundaries cannot be ascertained, per Fry, J., in *Spike v. Harding*, u.s., dissenting from Plumer, V.C., in *Miller v. Warmington* (1820), 1 J. & W. at p. 491.

Where the defendant asserts that he has delivered up the whole land in lease, and this is separated from land which he asserts to be his own by a clear boundary, the

plaintiff must show a legal title to some of the lands still in the possession of the defendant. *Godfrey v. Littel* (1831), 2 Russ. & M. 630, per Brougham, L.C. There is a presumption that the confusion has been caused by the tenant. S.C. 1 Russ. & M. 63.

Parties.—All persons having any interest in the premises are necessary parties. *Rayley v. Best*, ib. 659.

Commission Refused.—In this latter case it was held that a commission will only issue against, and not at the instance of, him who confuses, and will not issue at all as between independent proprietors. See *Speer v. Crawler*, u.s.

Inquiry.—An inquiry in chambers is preferable to a commission. *Spike v. Harding*; *Searle v. Cook*, u.s.

SEASONABLE WOOD, ETC. (a).

Silva Cædua—Seasonable Wood.
Thinnings.

Dotards.
Fruit Trees.

Silva Cædua.—One branch of the law applicable to underwoods is concerned with those trees which are cut periodically in a regular course of felling, and are called *Silva Cædua*, or seasonable wood. The leading case on the subject is one which is reported in the Year Book, 11 Hen. 6, Mich. No. 3, where a tenant for years was sued for felling one hundred oaks. His counsel pleaded that the wood was wont to be cut at the age of twenty years and under, and that the oaks being of the age of twenty years, were cut as seasonable wood. It was the opinion of the whole Court that the defendant could not justify cutting the oaks as "seasonable wood" if he said that they were of the age of twenty years, for if they were passed the age of twenty years it would not be seasonable wood (b). Martin, J., said: "In some places that which is called *haut-bois*, is in other places only seasonable wood and underwood, according as there is great plenty of wood; for where there is great plenty of wood, great oaks of the age of twenty years and under have been wont to be cut as seasonable wood; but where there is

(a) See 8 Bacon 384; 22 Viner 441.

(b) Evidently there was no local custom proved.

scarcity of wood it is not wont to be cut as seasonable wood; wherefore if it has not been used to be cut as seasonable wood, then you will show that to the Court, for it may very well be seasonable wood, and oaks, which are called wrattons, which will not become timber, but is fit for the fire, it is not adjudged w., in whatever place it is." Of course the remarks as to scarcity and plenty of wood making the material difference, must be taken merely as a generalisation of fact, and not as a rule of law. Broke, W. pl. 134; 2 Rolle Abr. p. 817.

The next important case to consider is that reported in Godbolt No. 4, *Anon.* (1571), where "Dyer and all the other Justices held, that a termor or tenant for life might cut all underwood which had been usually cut within twenty years. . . . In the wood countries they may fell seasonable wood which is called *sylva cædua* (c) at twenty-six, twenty-eight, thirty years, by the custom of the country. And so the usage makes the law in several countries. . . . But they agreed that the cutting of oaks of the age of eight years or ten years is w. But by Meade, J., the cutting of hornbeams, hazels, willows, or sallows of the age of forty years, is no w., because at no time they will be timber." Another question which was moved was, that at the time of the feoffment it was seasonable wood, and but of the growth of fourteen or fifteen years. Dyer, C.J., and all the other Judges said: "The time is limited by the law, which cannot be altered if it be not the custom of the country. . . . The time is incurred so as she [the tenant for life] cannot fell it, because the law doth appoint a time, which if it be

(c) "By these words, *silva cædua*, will grow again." Per Belknap, is to be understood every manner of C.J., in 50 Edw. 3, 10.
wood which can be cut down and

not felled before such time, that it shall not be felled by a termor, or a tenant for life, but it shall be w." In this case underwoods of a manor, usually cut at twenty-one years, had been allowed to grow for twenty-five years.

Fitzherbert quoting the two last cases says (N. B. 59 M.), "Also it is not w. to fell seasonable wood, which is used to be felled every twenty years, or within that time," and in a note is added, "oaks cannot be said seasonable wood, which are passed the age of twenty years, but by a custom in any place, where is plenty of wood, oaks under twenty years may be seasonable wood. And such a custom may be laid in the wood itself, &c."

Already, then, we have plenty of authority that timber and timberlike trees may be cut by a tenant for life or years, if cut according to custom, when it is called seasonable wood.

There is also the authority of the case in Godbolt from which it appears that exceeding the age of twenty years is no bar to felling wood and timber, provided the custom be observed.

There is other early authority to the same effect: *e.g.*, Broke's Ab. W. pl. 136, quoting a case (4 Edw. 6), "cutting oaks of the age of eight or ten years is w., for they can become timber in future, and that where there is a wood in which no underwood grows the termor cannot cut all, otherwise of the underwood, where oaks, ashes, and other principal trees grow in it, for there he can cut all the underwood, but termor can take oaks, ashes, &c., which are seasonable and which have been wont to be felled every twenty or sixteen, fourteen or twelve years, and also at twenty-six or twenty-seven or thirty years, if they are seasonable wood, which is called *silva cedua*."

See Viner's Ab. W., 442 E., 467.

The fixing of twenty years' growth as the time when trees become timber was due to 45 Edw. 3, c. 3 (1371), exempting trees over that age from tithe. It runs thus: "At the complaint of the said great men and commons, shewing by their petition, That whereas they fell their great wood of the age of twenty years, or of greater age, to merchants to their own profit, or in aid of the King in his wars, (2) parsons and vicars of holy church do implead and draw the said merchants in the spiritual court for the tythes of the said wood in the name of this word called Sylva Cædua, whereby they cannot fell their woods to the very value, to the great damage of them and of the realm: (3) it is ordained and established, That a prohibition in this case shall be granted, and upon the same an attachment, as it hath been used before this time."

Statutory Standils or Storers.—In *Brook v. Cobb* (1612), 2 Brownl. 150, the plaintiff assigned w. in cutting down twenty oaks in such a close, and forty oaks in such a close, &c. Upon the evidence it appeared that "the said oaks were remaining upon the land for standils, according to the statute (*d*), at the last felling, and they were of the growth of sixteen or twenty years, and that tithes were paid for it. And it was agreed by the Lord Coke and all the Justices, that this was no w. inasmuch as it was felled as acre-wood; and it was said by the Lord Coke, that though it be of the age of twenty or twenty-four years, yet if the use of the parties be to sell such for seasonable wood, this shall not be w.; and if tithes be paid for that it appears that it is no timber."

(*d*) 35 Hen. 8, c. 17 (repealed by 7 & 8 Geo. 4, c. 27, s. 1), by which at each felling of coppice or underwoods of twenty-four years' growth and under, twelve standils or storers

per acre were to be left uncut and preserved until "ten inches square within three foot of the ground." See *Herring v. St. Paul, &c.* (1819), 3 Swans. at p. 514.

Timber Estate.—*Ferrand v. Wilson* (1845), 4 Hare 344, raised the same question in a suit to determine whether an imperative trust was valid, which directed trustees to cut timber and invest the proceeds in other lands until a tenant in tail should attain the age of twenty-one years, an event which might not occur within the legal limits for accumulation. Sir James Wigram said: "The argument which requires me to treat the timber otherwise than as rents and profits, for the purposes of this suit, appears to proceed upon a fallacy. Timber upon parts of an estate must, for the present purpose, be considered and treated in the same way as it would be in the case of a timber estate. Now it could not, I apprehend, be effectually argued that the rents and profits of a timber estate, being let on lease, could be made the subject of accumulation, or of remote settlement, to which the rents of an ordinary estate could not be subjected; and if that may be assumed, it is difficult to understand why the circumstance that the owner is his own farmer should make a difference. The fallacy is in applying to a timber estate observations which apply only (if, indeed, in law they do apply) to a single tree. The owner of a timber estate buys it with reference to an annual return, as much as he does an estate not having timber on it. He can tell what rent by the year he gets from his woods with as much exactness as from any other part of his estate. If I were to admit that timber was not to be regarded as the other profits of a settled estate upon the ground only of the slowness of its growth, it would not be easy to avoid the application of the same reasoning to underwood. Underwood is not cut annually from the same stool. The average cutting from one stool is once only in twelve or fourteen years. The argument

supposes that nothing is to be regarded in the light of profits of a landed estate except what is gathered annually; and, if that argument were to be admitted, it would go far to take all timber estates, and, as a consequence, all timber, out of the rules of law against perpetuities." The learned V.C. then proceeded to hold the trust invalid also upon the ground that timber could not be made inalienable during the infancy of a tenant in tail, who cannot be restrained from w. (see "Infant"). He therefore held the trust to cut timber void and unapportionable (e).

Again, Romilly, M.R., in *Bagot v. B.* (1863), 32 Beav. 509: "It does not necessarily follow that all cutting of timber is w. In many places oak coppice is felled regularly every sixteen or eighteen years, leaving poles which are regularly cut every second fall, *i.e.*, every thirty-two or thirty-six years. This timber would, I apprehend, constitute the fair profits of the land to which the tenant for life would be entitled."

Then in *Dunn v. Bryan* (1872), 7 I. R. Eq. 143, Chatterton, V.C., said: "The principles to be derived from the cases on the subject appear to me to be, that it is not w. in a lessee to cut down trees not timber, unless they are planted for the ornament or shelter of the house, or perform some important function, such as supporting a bank, or the like; and provided also, that he cuts them so as not to destroy the germinative or reproductive power of the stools. Also that trees, even of the kinds that may

(e) Cf. *Lovat v. Leeds* (1862), 2 Drew. & Sm. 75, where Kindersley, V.C., held a tenant for life, who was unimpeachable for w., entitled to the proceeds of timber felled under an order of the Court, although the trustees were given the whole of

the "rents and profits" for the purposes of paying certain mortgages. This was a point of construction as to whether in this will "rents and profits" meant *annual* rents and profits.

become timber, do not attain that character till they are of twenty years' growth ; from which it would follow, that trees even of these kinds may, if under the growth of twenty years, be cut down by a lessee, at least if they be cut seasonably, that is to say, according to what has been done either with the same trees if springing from old stools, or other trees in the same place, or in the same neighbourhood on former occasions. And here the fact that they are saplings from old stools becomes important, as it shows a previous cutting of the same trees."

The next case which should be considered is *Harrison's Trusts* (1884), 28 Ch. D. 220 C. A., where the rights of a tenant for life to exhaust larch plantations, which are not reproductive, was determined to be in accordance with the custom of treating larch on the estate. See under "Wind-falls."

The standard authority is *Dashwood v. Magniac* (1891), 3 Ch. 306, where Sir G. H. Dashwood had devised his West Wycombe estate to trustees for the term of one hundred years if any of three persons, of whom his wife Lady Dashwood was one, should live so long, upon trust to pay a jointure and other annual sums, and subject thereto "upon trust to pay the surplus or residue of the yearly rents and profits of my said real estate unto my said wife during her life for her separate use, &c.," with remainders over. Power was given to Lady Dashwood, with the consent of the trustees, to fell timber for repairs. Lady Dashwood felled beech timber to the average annual value of £1,700, and it was to recover this timber money with interest that the action was brought. It was proved that she had cut in accordance with the system prevalent in that part of Bucks where the West Wycombe estate

was situated, that for sixty-four years before that, Sir George Dashwood (the testator) himself and his predecessors had cut substantially in accordance with the same custom, and that also in accordance with the custom the produce of the annual fall was treated as income and not as capital. Bowen, L.J., said: "In a case which is necessarily novel it is desirable to refer to the law of usufruct, on which the English law of w. is, to a great extent, based.

"The Roman law forbids in general language the cutting of timber trees: 'Si grandes arbores essent, non posse eas cædere' (*f*). The distinction between *silva cædua* and *silva non-cædua* is well known, and *silva cædua*, as a rule, was equivalent to coppice 'quæ succisa rursus ex stirpibus aut radicibus renascitur' (*g*), a meaning which found its way through the Ecclesiastical Law into the law of tithes and the English statutes dealing with tithes. The citation from the rescript of Hadrian (*h*), which alludes in general terms to the rights of cutting possessed by the usufructuary of a wood, probably relates to *silva cædua* only. But the Digest, so far as it treats of usufruct, is concerned mainly with the ordinary Roman farm or landed estate, of which coppice or *silva cædua* was a common adjunct, and the prohibition of the cutting of great trees which I have mentioned is primarily referable to such ordinary property. Roman forests were, beyond all question, the subject of revenue, both to the State, which farmed them continually, and to private individuals; and though there is no special allusion in the Digest to such cases, it is impossible to study the Roman law of usufruct without feeling convinced that had the

(*f*) Dig. Lib. VII., tit. 1, ss. 9, 11. (*g*) Dig. Lib. L., tit. 16, s. 30.

(*h*) Dig. Lib. VII., tit. 8, s. 22.

periodical croppings of big trees ever been a necessary part of their management and enjoyment, the law of usufruct would have sanctioned and compelled a distinction to be made in favour of their usufructuary. The Digest contains a wider definition of the term 'silva cædua,' and one of authority equal to that which identifies silva cædua with coppice. It is a definition that comes to us from Gaius, and it certainly affords some justification for the description of the 'timber estates' which we owe to the late Master of the Rolls (i) in *Honywood v. Honywood* (j): "silva cædua" est, ut quidam putant, quæ in hoc habetur, ut cæderetur' (k). It is upon the interpretation of this latter text, as read by the light of the general law of usufruct, that modern commentators base a right in the usufructuary to cut such plantations as are expressly cultivated for periodical felling and sale. (See Valgerow, 'Pandekten' (l); Sintenis, 'Civilrecht' (m), summarising an essay of Laspeyre's, 'Archiv für die civilistische Praxis' (n), and Roby's Justinian (o).) Even in the days of Voet (p) such a practice of felling timber trees at regular periods was considered to be well justified, when in conformity with the usages of the neighbourhood and the practice of the surrounding proprietors. The law of France followed in former times the strict prohibition of the Digest as to cutting great trees; Pothier, 'Du Douaire' (q). But during the last century exceptions arose in France in regard to the periodical felling of cultivated woods. (See Demolombe, 'Traité de la Distinction des Biens' (r),

(i) But see *Ferrand v. Wilson*, *supra*, and *Whitechurch v. Holworthy* (1812), 19 Vesey, p. 215, "Wood estate."

(j) Law Rep. 18 Eq. 306.

(k) Dig. Lib. L., tit. 16, s. 30.

(l) Page 735.

(m) Page 59.

(n) Vol. XIX., pp. 71-113.

(o) Page 77.

(p) Lib. VII., tit. 1, pl. 22.

(q) No. 197.

(r) 4^{me} éd., Vol. II., pp. 337, 338; Liv. III., tit. 3, ch. i., pl. 405.

Nouveau Denizart (s.) Finally the Code Napoléon (t) has provided that the usufructuary may cut timber in plantations that are laid out for cutting, and are cut at regular intervals, although the usufructuary is bound to follow the example of former proprietors as to quality and times."

The decision justified the cutting by Lady Dashwood. (And see p. 89.) It is the standard authority, and is worthy of close perusal *in extenso*.

THINNINGS.

The Principle.—It should be carefully borne in mind that the right to thin trees may only be exercised in a proper husbandlike manner, and in order to promote the better growth of the trees that are left standing, and that the limited owner, when he is making his selection, must disregard his own interest in the proceeds of the trees to be cut. On the other hand it would appear that the tenant is not precluded from cutting timber and timber-like trees if it is proper to cut them in a due course of thinning; though Jessel, M.R., would limit the right so to cut timber to timber estates, *Honywood v. H.* (1874), 18 Eq. 306.

The principle to be applied may be seen in the case of *Bridges v. Stephens* (1817), 2 Swans. 150 n., which, however, was not a case of thinning, but of more general cutting. Here Mrs. Stephens, one of the defendants, was in effect equitable tenant for life of one moiety of a term of one thousand years, which was vested in trustees without impeachment of w.; but there were no words to show

(s) T. ix., v° Fruits en matière civile, s. 2, No. 1.

(t) Code Civ. 591.

that the tenant for life was unimpeachable. The reversion in this moiety was purchased by the plaintiff, who, before completion, filed the present bill to restrain the defendant and her husband from felling timber on the estate, which was chiefly woodland; but the learned Judge in dissolving an injunction declared that the defendant was entitled as between herself and the persons claiming in remainder, to cut down and apply for her own benefit "such timber as was fit and proper to be cut, in the course of a due and husbandlike management of the woods in question."^(u)

Perhaps the most important case on the subject, although insufficiently reported, is that of *Cowley v. Wellesley* (1866), 1 Eq. 656; 35 Beav. 635. A special case was submitted to the Court, from which it appeared that Lord Mornington devised all his real estates to trustees upon trust for the plaintiff Earl Cowley for life, with remainders over; and with directions that the trustees should manage the same premises, and might cut timber and underwood from time to time in the usual course, for sale or repairs or otherwise. "Part of the real estate of the testator in Hampshire consisted of about three hundred and thirty-eight acres of woodland, on which there were trees and underwood, both of a thriving description, the trees being principally oak, and the course of management had for many years been to cut the underwood of from ten to twelve years' growth every year, and the underwood upon about twenty acres of the woodland had been cut every year. In the ensuing spring it was usual, where the underwood had been cleared, to cut down such trees as were likely to obstruct or prejudice

^(u) So in *Bagot v. B.* (1863), 32 Beav. at p. 518, Romilly, M.R., said: "I apprehend that proper and regular thinning of a wood, for the

purpose of improving the rest of the trees, within certain limits would not amount to w."

the growth of those intended to be preserved, and which, having regard to the general improvement of the woods, should be cut down.

“The trustees had followed this rule, and had applied the proceeds of the sale of the underwood as income, and the timber, being such thinnings as aforesaid, had been partly used in repairs on the estate, and the larger part had been sold.

“Part of the real estate in Wiltshire also consisted of woodlands, containing oak, ash, elm, Scotch fir, larch, and spruce trees, and underwood. During the testator's life the underwood was occasionally cut, but the trees in such woods and plantations were not thinned. It was considered desirable, in order to improve the growth of the woods, to fell a number of the trees, including trees of all the above-mentioned descriptions. The trees which had been felled were felled for the purpose of improving the growth of those remaining. Part of the trees so felled had been used for repairs upon the estate, and the remainder had been sold standing.” It will be observed that a regular practice of thinning was proved in the case of the Hants estate, but none in the case of the Wilts property, where, however, the plantations were young and not properly timber at all (see per Jessel, M.R., in *Honywood v. Honynwood* (1874), 18 Eq. 306). Lord Romilly in giving judgment, best reported in Beavan, held that the whole produce of the Hants woods was income, as it had all arisen from usual and regular thinnings, “and that the money produced by the sale of timber in the estates in the county of Wilts should be treated as capital, except *where it has been cut in the regular course of thinning.*”

Timber.—And he intimated an opinion that *timber*

trees felled to improve the growth of others could not be treated as thinnings. And this is consistent with *Honywood v. H.* (1874), 18 Eq. 306, where timber had been sold by order of the Court in an administration action, and it was proved that the trees cut were ripe and fit to be cut, and if left, would not improve but lessen in value, and that it would be for the benefit of the other timber if they were cut. The question was whether these trees felled in the regular course of thinning belonged to the equitable tenant for life or the remainderman. Jessel, M.R., said: "The tenant for life may not cut timber. . . . Once arrive at the fact of what is timber, the tenant for life, impeachable for waste, cannot cut it down. That I take to be the clear law, with one single exception, which has been established principally by modern authorities in favour of the owners of timber estates, that is, estates which are cultivated merely for the produce of saleable timber, and where the timber is cut periodically. The reason of the distinction is this, that as cutting the timber is the mode of cultivation, the timber is not to be kept as part of the inheritance, but part, so to say, of the annual fruits of the land, and in these cases the same kind of cultivation may be carried on by the tenant for life that has been carried on by the settlor on the estate, and the timber so cut down periodically in due course is looked upon as the annual profits of the estate, and therefore goes to the tenant for life. With that exception, I take it, a tenant for life cannot cut timber; therefore I hold in this case, it not being a timber estate, that the tenant for life cannot cut timber at all (*v.*) . . . Then we come to the property in trees not timber, that is, those which are not

(*v.*) It is this passage which, it is said in *Dashwood v. Magniac* (1891), 3 Ch. at p. 357, may be too general.

timber either from their nature, or because they are not old enough, or because they are too old. In all those cases, I take it, the property is in the tenant for life. If he cuts them down wrongfully, and commits waste, the property is still in him, though he has committed a wrong, and would be liable to an action in the nature of w. I am not sure that would follow in Equity. My impression is that Equity would say that he should not be allowed to take the benefit of his own wrong, and that he should not be allowed to take the property in those trees he cuts down. That is not the case at Common Law, and I am not aware that the exact point has been decided in Equity. If the present tenant for life has cut down oak, ash, or elm *under twenty years of age*, in a due course of cultivation, and *for the purpose of improving the growth, or allowing the development of timber trees*, she will be entitled to the proceeds of the trees so cut down, as I understand is actually the case, then I shall direct an inquiry to ascertain what portion of the proceeds she is entitled to." The learned Judge therefore decided that a tenant for life is not entitled to thinnings, if such thinnings are in fact timber, unless occurring on what he termed a timber estate.

Trees not Timber.—Next comes *Harrison's Trusts* (1884), 28 Ch. D. 220, in which plantations of larch (not shown to be timber according to the custom of the country) were settled, the trustees having a power of sale, and of determining what was capital and what income. They treated the thinnings of the larch as income, a practice which was expressly approved by the Court of Appeal (p. 231). The question arose for decision upon the occasion of a large windfall, and the Court held the tenant for life entitled to the same income from the investment of the proceeds, as

she had previously received from the regular thinnings and fellings of the trees. (See this case, p. 81). (*w*) An earlier instance of windfall occurred in *Buteman v. Hotchkin* (1862), 31 Beav. 486, where Lord Romilly, M.R., said: "I am of opinion that the tenant for life is entitled to have the benefit of the sale of all such trees felled by the wind as he would be entitled to cut himself, and to *all fair and proper thinnings*, and to all coppices cut periodically in the nature of crops."

Proper Thinning. Timber Estate. — As to what is proper thinning, it is necessary to refer to the famous authority of *Dashwood v. Magniac* (1891), 3 Ch. 306, where Chitty, J., said: "Proper thinning must depend upon the nature of the trees. Proper thinning of a wood in which the oak is the principal tree would, as I apprehend, leave standing the larger oaks, except where they interfered with each other's growth; proper thinning in a beech wood is (as the evidence before me proved) to fell the larger trees for the due succession" (p. 330). Again, from the judgment of Lord Justice Lindley it appears that the proper mode of thinning and felling may be determined by the usage of the locality. He says at p. 355: "So if a man has property in a country where there is a well-known course of cultivation, and he specifically grants or devises such property, he naturally does so upon the assumption that the well-known usage of the district will be observed by those to whom he gives the property; and I take it to be clear that evidence of such a usage can no more be excluded in construing a will expressly devising such property than in construing a lease of it. . . . Now, as to the evidence, I have read it carefully, and, without alluding to it in detail, I consider it proved, first, that

(*w*) See *Pidgeley v. Rawling* (1845), 2 Coll. 275.

beech trees are timber in Buckinghamshire ; secondly, that in the ordinary course of good forestry beech woods ought to be treated very differently from other woods, and that from time to time the large trees ought to be taken out so as to promote the growth of younger trees and ensure a succession of good timber ; thirdly, that it is the practice, in that part of Buckinghamshire in which these estates are, for the owners of beech woods to act on this principle, and that the beech woods on these estates have been managed accordingly for many years ; fourthly, that beech trees so treated are regarded as crops ; fifthly, that the proceeds of their sale are regarded as income, and not capital ; and lastly, that no distinction is known to the witnesses between owners in fee and limited owners in these respects, although in leases it is usual to except timber and beech woods and to reserve the right of cutting them to the lessors. It is, I think, incredible that, if the usage did not extend to tenants for life, the witnesses would not have known such to be the case. I infer, therefore, that the usage is general and applies to tenants for life, although not expressly made unimpeachable for w. I do not think the usage immemorial, although I infer that it is as old as the cultivation of beech woods. The mode of managing beech woods is based on the nature of beech, and the usage in this particular locality has arisen from the quantity of beech and from the trade which has sprung up in consequence of its existence in large quantities ; and it is obvious from the evidence that the large part of the ordinary rents and profits of these estates, and of others in the neighbourhood, is derived from the felling of trees in the beech woods upon them according to the usage proved. Any person entitled to the rents and profits of these estates would, therefore,

presumably be entitled to the proceeds of beech trees felled according to the usage. At least, that inference may be fairly drawn in the absence of all evidence to the contrary, and it is the inference which I draw from the evidence as it stands. The testator in this case always managed his beech woods in the way described, and must be taken to have known of the usage, and to have made his will with reference to it. To exclude evidence of such a well-known local usage or to disregard it in construing his will would, in my judgment, be a great mistake. . . . I ought to add, that the usage on which I base my judgment is confined to beech, and does not extend to oak trees growing in beech woods." (This last sentence was not agreed to by Bowen, L.J., who said at p. 367: "I draw no distinction as to any timber which, though not beech, has been cut and cultivated in the same course of management and on the same principle," and Lindley, L.J., acceded subsequently to this view, see p. 388.)

Lord Justice Bowen said at p. 362: "The Year Books and the older Abridgments are not likely to furnish illustrations in which legal principles are applied to a comparatively modern system of arboriculture. Mining and quarrying have come down to us from the remotest ages; but the culture and the periodical croppings of trees such as that proved in the case before us, are the growth of a later period altogether. Occasion to invoke the principle for the benefit of grantees of 'timber estates' arises only in a time when woods are cultivated on the plan of annual croppings, and when to treat them otherwise would be to destroy the revenue of a property and to paralyse its management. . . . The first question must still always be, whether the consumption of the particular part of the inheritance under discussion is necessary for its reasonable

enjoyment. The second question will then arise, namely, whether in any reasonable view of the circumstances of the case, the grantor must have intended such particular portion of the inheritance to be reasonably enjoyed. For it will not necessarily follow that, because it seems advantageous to the inheritance to have the timber felled, the grantor must have intended its felling. Reasonable necessity of construction, not the prudent management of estates, lies at the bottom of the doctrine which we are considering."

Assignment of Woods, &c.—The question as to who is entitled to thinnings between an assignor and assignee of woods, timber, &c., was adjudicated upon in *Gordon v. Woodford* (1859), 27 Beav. 603. Here a tenant for life, unimpeachable for w., assigned for valuable consideration to the trustees of the settlement under which he held, "all and singular the timber and timber-like trees then growing and being, and which should thereafter grow and be upon the lands, &c.," and which the tenant for life had or would have "as tenant for life without impeachment for w., power to cut or fell and dispose of for his own use and benefit." The tenant for life subsequently cut thinnings and claimed to be entitled to do so. Romilly, M.R., said: "The principal part of the property consists of wood, and it is a matter of considerable importance, not only that it should be properly thinned, but that the thinnings should be employed and used on the estate for fencing and other matters, and that would seem to be the legitimate and proper purpose to apply them to. But the question here is to whom do the thinnings belong, and who is to have the right of judging what ought and what ought not to be cut. I am of opinion that it is impossible to get out of the words 'shall hereafter grow and be upon the said

lands.' They not only include the existing trees, but those to grow in future; every sapling then growing, however young, is therefore comprised in the deed." He also held that the grantees had the power of determining what were proper thinnings.

Planting by Life Tenant.—One or two further points are to be noticed. Where a planting has taken place by way of the improvement of an estate under the Settled Land Acts, 1882 to 1890, the tenant for life and each of his successors in title may thin any trees so planted; s. 28, ss. 2 of the Act of 1882 forbidding cutting by such limited owners "except in proper thinning," 45 & 46 Vict. c. 38.

Saleable Underwood.—In *R. v. Ferrybridge* (1823), 1 B. & C. 375, it was held that thinnings of trees, being firs and larches which had been planted, not for profit but for the protection of young oaks and ashes, were not rateable as "saleable underwood" to the relief of the poor; and the Court was further of opinion, though this was not necessary to the decision, that these trees being planted for protection and not being renewable as underwood, were not underwood at all. (See *supra*, p. 58.) The law as to "saleable underwoods" was altered by the Rating Act, 1874.

DOTARDS, ETC.

Apart from a tenant's right to cut dead wood for "botes" (p. 43), he has an absolute right to fell dotards during his tenancy and to appropriate them to himself. "The cutting of dead wood, that is, *ubi arbores sunt aridæ, mortuæ, cavæ, non existeutes maremium, nec portantes fructus, nec folia in æstate*, is no w." Co. Lit. 53 a. See 22 Viner 435; Fitz. N.B. 59 (m.); 8 Bacon

394. "Dotard" is defined in the Century Dictionary as an aged, decaying tree, and in Latham's dictionary as a standing tree in a state of decay. But *Manwood's Case* (1573), Moore 101, Dyer 332, Bend. 217, which turned on a point of pleading, serves to show that for appropriation by the tenant the dotard must bear no fruit or foliage in summer, and be so decayed as to be worthless, not only for buildings, but even for such inferior purposes as making posts (x).

The Right.—There are two old cases which bear out the principal proposition, the first of them being the celebrated *Herlakenden's Case* (1589), 4 Coke 62 a, where it was resolved "that if trees being timber are blown down by the wind, the lessor shall have them (for they were parcel of his inheritance) and not the tenant for life or tenant for years; but if they be dotards without any timber in them, the tenant for life or tenant for years shall have them." Then the *Countess of Cumberland's Case* (1611), Moore No. 1099, p. 812, came next, brought to decide, *inter alia*, who was entitled to a windfall of birch, proved to be timber by the custom of the county of York. The Court said: "So it is of windfalls . . . they belong to those in reversion, but not if they are dotards and have no timber in them." Again in 1 Rolle Abr. 181, it is said that windfalls which are not timber belong to the lessee. The same subject was discussed again in *Channon v. Patch (y)* (1826), 5 B. & C. 897, where the defendant was lessee for years (determinable on lives) of certain lands "excepting all timber trees or young saplings likely to become trees." The lessor during the term felled two

(x) In *Perrot v. P.* (1744), 3 Atkins 94, where Lord Hardwicke granted an injunction against w., the timber

does not seem to have been thoroughly decayed.

(y) *S.C. Chapman v. Patch*, 8 D. & R. 651.

pollard oaks, which were found by the jury to have been decayed and fit only for firewood. The defendant appropriated them, and it was held that he was within his right. "If the lessor would have had no right to these trees if they had been severed from the inheritance by the act of God, he can have no right to them when they have been severed by his own wrongful act," per Bayley, J.

Although timber is decayed, it may not be cut if it serves for ornament or shelter to the seat; *Lushington v. Boldero* (1819), 6 Madd. 149, in which case it was inferred from the conduct of the settlor that the trees were left standing for ornament. See "Equitable W.," p. 186.

As to obtaining an order of the Court for the cutting of decaying timber, see Index.

FRUIT TREES. GARDEN.

The statute specially mentions w. in boscis et gardinis, and therefore a tenant may not cut down fruit trees growing in a garden or orchard. Co. Lit. 53; 2 Rolle Abr. 818; 22 Viner 443; Broke, W. pl. 143. But if the fruit trees grow upon any land which the tenant holds out of the garden or orchard, it is not w. within the statute, ib. But though not protected by statute, doubtless they were by an action on the case, though not growing in a wood or garden. An injunction was granted to protect fruit trees in *Kaye v. Banks* (1770), Dickens 431.

"And if apple trees (*i.e.*, in a garden, &c.) are abated by a great wind, and fall upon the crops, and several of the boughs fall into the land, and the same apple trees bear fruit two years after, if the lessee grubs them up,

it is w." 22 Viner 443. And see Broke, W. pl. 39; 2 Rolle Abr. 817. But "if apple trees are rooted up by a great wind, it is not w. if the lessee cuts them afterwards." 2 Rolle Abr. 820, and see the references.

Construction. Not included in "Trees."—In *Bullen v. Denning* (1826), 5 B. & C. 848, it was held that fruit trees (apple trees in this case) were not excluded from a demise by words excepting therefrom "all timber trees and other trees, but not the annual fruit thereof," on the ground that the word "fruit" applied to and was satisfied by the produce of the timber trees without including the produce of what are popularly called fruit trees. "The word trees, generally speaking, means wood applicable to buildings, and does not include orchard trees," per Littledale, J. To the same effect was the earlier decision in *Wyndham v. Way* (1812), 4 Taun. 316, the exception being "of all trees, woods, coppice, wood grounds, of what kind or growth soever." And see the note to that case giving other authorities, and specially "apple trees and fruit trees pass not under the general name of trees." So *London, Bp. v. N*— (1523), Year Book, Mich. 1.

The Rights of Nurserymen.—In *Wardell v. Usher* (1841), 3 Scott N. R. 508, Erskine, J., directed the jury, and it was held rightly, "that, *primâ facie*, all growing trees were the property of the landlord, but that, if planted by a nurseryman in the way of his trade, he was entitled to remove them, provided they were not of larger growth than could be dealt with by the tenant in his trade as a nurseryman; and he left it to them to say whether the trees which the defendant was proved to have carried away were such as might fairly be considered as nursery trees." And see generally as to the

tenant's right to remove fixtures, the notes to *Elwes v. Mawe*, 2 Sm. L. C., Amos and Ferard on Fixtures.

Nursery trees cannot be distrained on for rent. *Clark v. Gaskarth* (1818), 8 Taun. 431; and notes to *Simpson v. Hartopp*, 1 Sm. L. C.

Compensation for Planting.—By the Agricultural Holdings Act, 1883, Sch. 1, a tenant is entitled to compensation on the termination of his tenancy for improvements made with the previous written consent of his landlord, and *inter alia*, for, (6) making of gardens, (10) planting of hops, (11) planting of orchards or fruit bushes, (4) making and planting of osier beds.

And see Bund's Agric. H. Act, pp. 38, 87, 122, for instances of customary compensation for planting fruit trees.

Allotment.—"A tenant of an allotment (held under a sanitary authority) may, before the expiration of his tenancy, remove any fruit and other trees and bushes planted or acquired by him, for which he has no claim for compensation." Allotments Act, 1887, c. 48, s. 7 (6).

By c. 26 of the same year, compensation is payable on the determination of a tenancy of an allotment or cottage garden, held of a private landlord, in respect of fruit trees and fruit bushes planted by the tenant with the previous written consent of the landlord, s. 5.

Ireland.—By 51 & 52 Vict. c. 37 (1888) the Timber Act, 23 & 24 Geo. 3, c. 39 (Ir. 1783), was extended to fruit trees planted by the tenant, and tenants under the Land Law (Ir.) Act, 1881, c. 49, were included.

WASTE IN TIMBER.

What is Timber?

Custom—of the Country, Parish, Estate, &c.

By Common Law. By Custom.—In Co. Lit. 53 *a*, it is said, “w. . . . is in timber trees (viz., oak, ash, and elm, and these be timber trees in all places) either by cutting of them down, or topping of them, or doing any act whereby the timber may decay. Also in countries where timber is scant, and beeches or the like are converted to building for the habitation of man, or the like, they are all accounted timber,” and they are parcel of the inheritance, 8 Bacon 383. So in *Honywood v. H.* (1874), 18 Eq. 306, Jessel, M.R., said: “By the general law of England, oak, ash, and elm are timber, provided they are of the age of twenty years and upwards, provided also they are not so old as not to have a reasonable quantity of useable wood in them sufficient, according to a text-writer (*a*), to make a good post. Timber, that is, the kind of tree which may be called timber, may be varied by local custom. There is what is called the custom of the country, that is, of a particular county or division of a county, and it varies in two ways. First of all, you may

(*a*) Gibbons on Dilapidations; but see “Dotards,” p. 93.

have trees called timber by the custom of the country—beech in some counties, hornbeam in others, and even whitethorn and blackthorn, and many other trees, are considered timber in peculiar localities—in addition to the ordinary timber trees. Then again, in certain localities, arising probably from the nature of the soil, trees of even twenty years old are not necessarily timber, but may go to twenty-four years, or even to a later period, I suppose, if necessary; and in other places the test of when a tree becomes timber is not its age but its girth (*b*). These, however, are special customs.” It is to be observed that the latter part of this quotation is at variance with the opinion of Lord Ellenborough, who held in *Aubrey v. Fisher* (1809), 10 East 446, that when trees which are timber by custom attain the age of twenty years, all the ordinary properties of timber attach; but this opinion is not good as a general proposition, and only holds with reference to the pleadings in the case. *Dashwood v. Magniac* (1891), 3 Ch. at p. 353.

Construction.—So in construing contracts, timber will be held to include those trees which are timber by the custom of the country. In *Chandos v. Talbot* (1731), 2 P. Wms. 600, King, L.C., held in a suit as to a contract to pay a valuation price for timber on the purchase of an estate: “It is the custom of the country that makes some trees timber which in their nature, generally speaking, are not so, as horse-chestnut and lime trees, so of birch, beech and asp, and as to pollards, notwithstanding what is said in Plowden 470 in the case of *Soby v. Molyns*, that these are not timber, and that tithes are to be paid of their loppings (which could not be if pollards were timber), yet if the bodies of them be sound and good,

(*b*) Cf. *Smythe v. S.* (1818), 2 Swans. 251.

I incline to think them timber; *secus* if not sound, they being in such case fit for nothing but fuel." Again, in a sale by an unimpeachable life tenant to the trustees of his settlement of all timber and timber-like trees, Romilly, M.R., held that the trustees were entitled to "all that species of wood which is timber by the custom of the county" of Cumberland. *Gordon v. Woodford* (1859), 27 Beav. 603. In a contract to value, "timber" means trees that are such by the common law and custom of the country, but does not include trees and saplings generally. *Whitty v. Dillon* (1860), 2 Fost. & F. 67.

Extent of Custom.—The custom must be that of the "particular part of the country where the trees grow," per Lord Mansfield in *R. v. Minchinhampton* (1762), 3 Burr. 1308; or of the parish, *Layfield v. Cowper* (1694), 1 Wood 330; *Abbot v. Hicks* (1695), 1 Wood 319; *Walton v. Tryon* (1751), 2 Gwill. 827; Amb. 130; 1 Dick. 244; so in *Dashwood v. Magniac* (1891), 3 Ch., common usage in the neighbourhood was held sufficient by Chitty, J., p. 325; by Lindley, L.J., p. 355; by Bowen, L.J., p. 366.

In this last case it was held by the same Judges (pp. 326, 352, 365 respectively) that proof of usage on the estate was enough, though the owners had been limited and not impeachable, following a dictum of Jessel, J., in *Honywood v. H.* u.s., to the effect that on a timber estate the custom of cultivation on the estate itself regulates the right of a limited owner to cut timber. In the principal case the question was as to the right of an equitable life tenant to cut customary timber as seasonable wood (see p. 81). Kay, L.J., denied that local usage can be imported into a will as it can into a husbandry covenant.

Length of Custom.—Modern usage is sufficient, provided

it be clearly established. *Tucker v. Linger* (1883), 8 A. C. 308; *Dashwood v. Magniac* (1891), 3 Ch. at p. 358; *Dalby v. Hirst* (1819), Brod. & B. 224, 3 Moore 536; *Legh v. Hewitt* (1803), 4 East 154, 7 R. R. 545.

Particular Trees Beech.—Beech has been held to be timber in Bucks, 2 Rolle Abr. 814; 22 Viner 435; 8 Bacon 384; *Aubrey v. Fisher* (1809), 10 East 446 (by admission); in the parish of Buriton, Hants, *Layfield v. Cowper* (1694), 1 Wood 330; of Whitcomb Magna, Gloucestershire, *Abbot v. Hicks* (1695), 1 Wood 319; of Minchinhampton, Gloucestershire, *R. v. Minchinhampton* (1762), 1 Burr. 1308; said to be timber in the Weald of Kent by Hardwick, L.C., in *Walton v. Tryon* (1751), 2 Gwill. 827, &c. See *Palmer's Case* (1612), Co. Lit. 53 a.

Birch.—Birch is timber in Berks for the most part, 2 Rolle Abr. 814, 8 Bacon 384; and by the custom of the county of York, *Countess of Cumberland's Case* (1611), Moore 812.

Thorn.—Whitethorn may be timber, *Palmer's Case*, u.s.; and blackthorn was held timber in *Cook v. C.* (1639), Cro. Car. 531, 2 Rolle Abr. 819.

Willow.—Apparently willows are not timber within the county of Southampton (Hampshire), *Guffly v. Pindar* (1617), Hobart 219, for the Court said they would be titheable when cut, though grown within sight of the house.

Proof of Custom.—The custom is proved by the uses to which the wood is put, e.g., to building "sheep houses, cottages, and such mean buildings," *Countess of Cumberland's Case*, u.s.; by showing that it is "useable for timber uses," *Layfield v. Cowper*, u.s.; but in *R. v. Minchinhampton*, u.s., Lord Mansfield said the question depended not on usage but on the custom of the

country, but it is submitted that usage proves the custom, so that practically this is a distinction without a difference. And Co. Lit. 53 *a* says: "Also in countries where timber is scant, and beeches or the like *are converted to building* for the habitation of man, or the like, they are all accounted timber."

Judicial Notice.—In *Aubrey v. Fisher* (1809), 10 East 446, Lord Ellenborough said that the Court was bound to take judicial notice of the custom of the county of Bucks, as it had been supported by decided cases and by Lord Coke.

Applies to Agricultural Holdings only.—The custom of the country only applies to an agricultural holding, *Johnstone v. Symons* (1847), 9 L. T. 535; *Dalby v. Hirst* (1819), 1 Brod. & B. at p. 237.

MINERALS.

WASTE IN MINES AND MINERALS.

General Principle.—Lord Coke says in *Co. Lit.* 53 *b*: “Digging for gravel, lime, clay, brick earth, stone, or the like, or for mines of metal, coal or the like, hidden in the earth, and were not open when the tenant came in, is w.; but the tenant may dig for gravel or clay for the reparation of the house as well as he may take convenient timber trees” (2 *Rolle Abr.* 815, 816), where it is also said that if a lessee digs out earth and carries it away from the land, an action of w. lies, but that “if a lessee of land opens mines of coal, iron, and stones, and dig the coals, iron, and stones so much as are necessary for him to use without selling, this is not w.,” and see 8 *Bacon* 385, 394.

Again, “A man hath land in which there is a mine of coals, or the like, and maketh a lease of the land (without mentioning any mines) for life or for years; the lessee for such mines as were open at the time of the lease made may dig and take the profits thereof. But he cannot dig for any new mine that was not open at the time of the lease made, for that would be adjudged w.” *Co. Lit.* 54 *b*. In *Astry v. Ballard* (1675), *Jones* 71, 2 *Mod.* 193, *Freeman* 445, 2 *Lev.* 185, it appears from all the reports, except *Lev.*, that a lease was made with no mention of mines, and it

was held that he could not open new ones, though he could continue the open mines. The reason is that the grantor or settlor has made the proceeds of the mine part of the fruits of the land, *Campbell v. Wardlaw* (1883), 8 A. C. at p. 650; cf. as to a timber estate, *Dashwood v. Magniac* (1891), 3 Ch. 306. To this agrees *Saunders' Case, S. v. Marwood* (1599), 5 Co. 12 a, 1 Brownl. 141, Cro. El. 683, in the first two resolutions. Again, "And if there be open mines and the owner make a lease of the land, with the mines therein, this shall extend to the open mines only, and not to any hidden mine." Co. Lit. 54 b. This is consistent with the third resolution in *Saunders' Case*: "If a man hath mines hid within his land, and leases his laud and all mines therein, there the lessee may dig for them."

"But if there be no open mine and the lease is made of the land together with all mines therein, there the lessee may dig for mines and enjoy the benefit thereof; otherwise these words should be void." Co. Lit. 54 b; 2 Rolle Abr. 816; *Case of Mines*, Plowden, p. 337, per Dyer, C.J.

Where, however, a settlement is made by a grant to trustees of lands "and all mines, waters, trees, &c." in general words, Macclesfield, L.C., said: "A. having only an estate for life subject to w., he shall no more open a mine than he shall cut down the timber trees, for both are equally granted by this deed." And to this King, L.C., agreed on a rehearing; *Whitfield v. Bewit* (1724), 2 P. Wms. 240; 2 Eq. Ca. Ab. 589. Here must be mentioned the case of *Darcy v. Askwith* (1616), Hobart 234, where there was a lease with the general words "woods, sales of woods, great timber and trees, mines of coal, &c., in as ample a manner, &c., as the lessor had

them." It seems to have been conceded that the lessee could cut timber and open and work mines under these words, but it was adjudged that he could not cut timber for use in the mines, whether old or new, although "both lessor and lessee had used to take timber for those purposes," per Hobart, L.C.J. The case is better reported in Hutton 19, so far as this point goes: "no more than one may make a brick kiln and burn brick, or a lime kiln and burn lime, with wood growing upon the ground, and sell the brick or lime, no more may the defendants in this case cut down wood for the making and supporting of these mines for coals which they sell." So from this report it would seem that in each instance the use of the wood was only wrong because the brick, lime, and coal was for sale and not for use.

A life tenant has no right to appropriate minerals deposited by a stream in its bed, or in the bed of a pool through which it flows. *Thomas v. Jones* (1842), 1 Y. & C. C. C. 510.

Open Mine.—All the cases show that a mine which has been only worked for home consumption and not for sale, is not an open mine so as to be available to a limited owner to work for profit. In particular, it is useful to refer to the judgment of the Court of Appeal, delivered by Cotton, L.J., in *Elias v. Griffith* (1878), 8 Ch. D. at p. 532: "To enable a termor or tenant for life punishable for w. to work mines, it must be shown that the owner of the inheritance, or those acting by his authority, have commenced the working of the mines with a view to making a profit from the working and sale of what is part of the inheritance. When this is established, though no profit has in fact been made, the mine is open in such a sense as to justify the continuance of the working by a

termor. When it is established that a quarry has been worked by, or by the authority of, the owners of the inheritance, for the purpose of making a profit by digging, or otherwise raising and selling part of the inheritance, the same principle applies. There is, however, this difference between a mine and a quarry, namely, that stone or slate is frequently dug for the purpose of building or repairing houses on the property and not for the purpose of profit, and although this is in one sense an opening of a quarry, it is not so in the sense necessary to enable a termor to continue the working. It is not an opening for the purpose of profit. It is not a devotion of the land to the purpose of making profit by the raising and sale of a portion of the inheritance." S.C. nom. *Elias v. Snowdon, &c., Co.* (1879), 4 A. C. 454, at pp. 459, 465, where Lord Selborne said: "I am not at present prepared to hold that there can be no such thing as an open mine or quarry, which a tenant for life or other owner of an estate impeachable for w. may work, unless the produce of such mine or quarry has been previously carried to market and sold. No doubt, if a mine or quarry has been worked for commercial profit, that must ordinarily be decisive of the right to continue working; and, on the other hand, if minerals have been worked or used for some definite and restricted purpose (*e.g.*, for the purpose of fuel or repair to some particular tenements), that would not alone give any such right. But, if there has been a working and use of minerals not limited to any special or restricted purpose, I find nothing in the older authorities to justify the introduction of sale, as a necessary criterion of the difference between a mine or quarry which is, and one which is not, to be considered open in a legal sense. Use, as well as sale, is a perception

of profit. None of the dicta which are to be found in some of the more modern cases (each of which turned upon its own peculiar circumstances) can have been intended to introduce a condition or qualification not previously known into the law of mines."

After a great lapse of time, in this case about fifty years, the onus will be thrown on the complaining party of showing that mines were not lawfully opened, the circumstances being such as were consistent with lawfulness. "Under the circumstances of this case, all reasonable presumptions of fact, not inconsistent with what is proved on either side, ought to be made in favour of the lawfulness of what has so long been done." (P. 465.)

Where a tenant in tail under a settlement works and opens mines, by himself or by his guardian, and dies without issue, the remainderman for life may work them for his own profit. *Clavering v. C.* (1726), Mos. 219; 2 P. Wms. 388; Sel. Ca. in Ch. 79; 2 Eq. Ca. Abr. 589, per King, L.C. And a mortgagee by term of years, who forecloses, has a right to work mines opened by the freeholder during the mortgage, as well as those open at the time of the mortgage. *Elias v. Griffith* (1878), 8 Ch. D. 521; affd. nom. *E. v. Snowdon, &c., Co.*, 4 A. C. 454.

Reservation of Royalties.—In *Purcell v. Nash* (1836), 2 Jones Ex. 116, Joy, C.B., held that a reservation of royalties included the right of raising limestone, a case misconstrued by Cusack Smith, M.R., who held in *Mansfield v. Crawford* (1846), 9 Ir. Eq. 271, that quarries are not on the same footing as mines. This is obviously not the law, see *Elias v. Griffith*, u.s.; *Moyle v. M.* (1599), Owen 66.

Dower.—In *Stoughton v. Leigh* (1808), 1 Taun. 402,

11 R. R. 810, it was held by Mansfield, C.J., and other Judges on questions submitted to them by the Court of Chancery, that a widow is dowable out of mines which have been worked during the coverture, whether by the husband or his lessees, and whether the working has been discontinued by the husband or by his lessees after his death. But she is not dowable out of mines or strata that have not been opened at all during his life. Where land has been assigned to her for her dower, on which is an open mine, she can work it for her benefit.

Contract to Lease.—Where a testator contracts to grant a mining lease and dies before granting it, the tenant for life under his will is entitled to the income under the lease, as if it had been granted in the testator's lifetime. S. 11 of the Settled Land Act, 1882, does not apply to the lease granted in pursuance of this contract, *Re Kemeys-Tynte* (1892), 2 Ch. 211, per North, J.; but where preparations only had been made for opening a mine, it was treated as unopened, *Viner v. Vaughan*, *infra*, p. 109.

Trustees.—An express or implied provision that the minerals should or might be worked by the trustees would give the life tenant the beneficial interest, *Campbell v. Wardlaw* (1883), 8 A. C. at p. 650; but see *Whitfield v. Bewit* (1724), 2 P. Wms. 240.

Construction.—A person entitled to the rents and profits until sale of an estate, which the testator has directed to be sold and the proceeds thereof invested in other lands, as to which the same tenant for life is to be unimpeachable, must not open mines or cut timber on the original estate, for he is not expressly made unimpeachable as to that, and to hold that he is so by implication would give him double w., *Plymouth v. Archer* (1782), 1 Brown C. C. 158. But he is entitled to the

profits of the open mines, *Miller v. M.* (1872), 13 Eq. 263.

Forms.—For form of declaration account and inquiry as to new mines opened, see *Ferrand v. Wilson* (1845), 4 Hare 388. And see “Account.”

Breaking Barriers.—*Marker v. Kenrick* (1853), 13 C. B. (Scott) 188, was argued on demurrer, and judgment was entered against a lessee for w. in breaking down the coal barriers between the land in demise and other mines, cf. *Mundy v. Rutland* (1882), 23 Ch. D. 81.

Abandoned Mines.—It follows as a corollary from the main statement of the right of a limited owner, that he has no right to work mines which have been abandoned at the date of his interest coming into possession, but the quantum of evidence necessary to show abandonment is a difficult matter, and capable of no definite proposition. The mere ceasing to work mines is not enough, unless from lapse of time or some other additional proof it appear that the owner had no intention of working them again. In *Viner v. Vaughan* (1840), 2 Beav. 467, it was shown that the testator had bought the land a few years preceding his death from an owner who had worked the clay-pits in question, that the testator had filled up part of the excavations, &c. Lord Langdale said: “It does not follow that the tenant for life has a right to open old abandoned pits and mines, or to commence opening any mines or pits which the author of the gift had merely made preparations for opening. This, however, is the question in this case; it appears there were old pits which had not been worked for twenty years; it is stated that the last owner, for some purpose or other, had taken some clay out of them, and had made some preparations for working them, yet it is not stated in the affidavits that

these pits were in the course of working at the time of the testator's death ; this, therefore, was not an open mine in the course of working at the death of the testator." The decision was afterwards affirmed by Cottenham, L.C., p. 470 n.

Lord Romilly said in *Bagot v. B.* (1863), 32 Beav. at p. 516: " A mine not worked for twelve months or two years before he became possessed of the property, must still be considered to be an open mine. A mine not worked for a hundred years could not, I think, be properly so treated ; and my present opinion is, that a mine which had not been worked for twenty or thirty years, from the loss of profit attending the working of it, but which, from the rise in price of iron and coal, had become remunerative, might, without w., be worked again by a succeeding tenant for life ; but if the abandonment of the mine had taken place long ago, and if the owner of the inheritance had discontinued the working, with a view to some advantage of the property which he considered would accompany such discontinuance, apart from the profits to be made from the sale of the mineral, then I doubt whether a succeeding tenant for life could properly treat that as an open mine. I state my general view of this subject, but I doubt whether I have before me sufficient materials to enable me to come to a satisfactory conclusion on this point."

Local Custom.—It may be that in some cases evidence may be procured to show that there is a local custom by which mines are considered to be abandoned after a certain time, *e.g.*, after a year and a day in the Duchy of Cornwall, as was suggested in the answer of the defendant in *Norway v. Rowe* (1812), 19 Vesey at p. 146. From Pearce's "Law and Custom of the Stannaries," p. 44, it

appears that tin-bounds, unwrought for seven years, may be wrought by others on giving notice to the owners and after subsequent neglect by them to work for another twelve months, on certain terms.

New Shafts.—A tenant for life of land which contains open mines, is entitled to bore new shafts for the purpose of pursuing an old vein of coals. *Clavering v. C.* (1729), Mos. 219; 2 P. Wms. 388, per King, L.C. In *Cowley v. Wellesley* (1866), 35 Beav. 635; 1 Eq. 656, Romilly, M.R., held that where a testator, tenant in fee simple, had worked gravel, loam, peat, and bog-earth for sale on the w. of the manor, the tenant for life under his will was entitled to open fresh pits on the w. And lastly, in *Elias v. Snordon, &c., Co.* (1879), 4 A. C. at p. 466, Lord Selborne said: "When a mine or quarry is once open, so that the owner of an estate impeachable for w. may work it, I do not consider that the sinking a new pit on the same vein, or breaking ground in a new place on the same rock, is necessarily the opening of a new mine or a new quarry;" citing the above cases and *Bagot v. B.* (1863), 32 Beav. p. 517.

New Seams or Veins.—*Spencer v. Scurr* (1862), 31 Beav. 334, is a case which depends on its own facts. The testator, who was the owner of an estate in Durham, made a lease of two open seams of coal by name "and all other seam and seams of coal." After his death it was discovered that there was a much deeper seam, which could only be worked through a new pit. The trustees of the will, who had no express powers of leasing, renewed the lease, and then the lessees began to work the deeper seam. Romilly, M.R., decided that the tenant for life in a moiety was entitled to her share of the rent, as income, which was clear enough on the construction of the leases,

also that a new shaft might be sunk ; but he went further than was necessary and held, apparently, that a new seam is not a new mine, a proposition that can hardly be of universal application, see *Stoughton v. Leigh*, u.s. ; and *Campbell v. Wardlaw* (1883), 8 A. C., where at p. 650, Lord Watson said : “ If the owner of the soil, the fiar, creates a mineral estate by working or letting a particular seam of minerals, he thereby brings the proceeds of the minerals so worked or let within the category of fruits, and within the right of usufruct.”

The primary sense of the word “ mine ” is “ vein.” *Abinger v. Ashton* (1873), 17 Eq. at p. 369, per Jessel, M.R.

The law of Scotland as to the interests of a life renter is the same as in England, *ib.*, per Lord Blackburn ; and see *Guild's Trustees* (1872), 10 Ct. of Ses. Ca., 3rd series, 911 ; *Wardlaw v. W.'s Trustees* (1875), 2 Ct. of Ses. Ca., 4th series, 368.

Power of Leasing, Effect of, &c. — A conveyance of land to trustees of a settlement “ together with mines, minerals, and quarries thereunder,” with a common power of leasing, with the consent of the tenant for life, mines not being mentioned, will not justify a lease of mines not open at the date of the settlement, though it will of mines then open. *Clegg v. Rowland* (1866), 2 Eq. 160, per Kindersley, V.C. This follows the principle laid down by Lord Coke, which appears at the beginning of this chapter.

In *Cowley v. Wellesley* (1866), 35 Beav. at p. 638, Romilly, M.R., held that a lease made by trustees of a will in pursuance of an arrangement made by their testator, and under a power of leasing contained in the will, was intended by the testator to enure for the benefit of the tenant for life.

In *Daly v. Beckett* (1857), 24 Beav. 114, joint tenants of an estate containing an open coal mine, settled the hereditaments "together with all mines and minerals," and gave power to the trustees to lease the "coal, minerals, and stone" by a lease whereby the tenants were not by any clause therein to be dispunishable for w. This restriction was held by Romilly, M.R., to be repugnant to the general power of leasing minerals, and the trustees were held to have power to lease both open and new mines for the benefit of the tenant for life. This decision seems to have gone too far, for it would have been sufficient to have restrained the restrictive words to the buildings and plant necessary for carrying on mining operations, and to acts injurious to the mines as going concerns.

Cf. *Lushington v. Boldero* (1815), Cooper 216, where Grant, M.R., held that a power given to trustees by a codicil to make certain leases, whereby the tenants should not be unimpeachable, was not inconsistent with an unimpeachable life tenancy given by the will.

In *Campbell v. Leach* (1775), Amb. 740, no decision seems to have been given as to the power to lease unopened mines under a similar power and restriction. The lessees appear to have been working the same mines and probably the same veins, though entering at lower levels than before the lease under the power, the execution of which was aided.

In *Morris v. Rhydydefed, &c., Co.* (1858), 3 H. & N. 885, before the Ex. Ch., the question of repugnancy was not argued. There the tenant for life under a settlement had power to grant mining leases for a term of sixty-three years "with all such accommodations, &c., as shall be necessary or are usually contained in leases of collieries

or mines in the neighbourhood . . . so that the lessees be not made punishable for w. by any express words therein contained." He granted a lease with power to build engine houses, workmen's cottages, &c., and with power to dig materials required for the mines or buildings on any part of the land. A jury found that the provision for building cottages, which was impeached, was necessary and usual in leases of collieries in the neighbourhood, and the Court held that the necessary deduction from this finding was that the lessee was not made expressly punishable in this particular. And see *In re Cartwright* (1889), 41 Ch. D. 532, and the other cases there referred to.

A tenant for life is in all cases entitled to the surface rent. *In re Ridge* (1885), 31 Ch. D. 504.

A life tenant who has made a lease of mines cannot obtain an injunction to prevent the lessee working under the lease, although the lessor had no power to grant it. The reversioner, however, could succeed. *Wentworth v. Turner* (1795), 3 Vesey 3.

By the Settled Estates Act, 1877 (see Appendix), the Court of Chancery has jurisdiction to authorise a mining lease for forty years. As to the powers of a tenant for life under the Settled Land Acts, see Appendix. And as to separate dispositions of land and minerals by trustees, see 56 & 57 Vict. c. 53, s. 44 (1893).

Ireland. Unopened Mines and Quarries.—Now by the Landlord and Tenant Act, 1860 (23 & 24 Vict. c. 154), s. 26, "No tenant of any lands holden for any estate or interest less than a perpetual estate or interest, made after the first day of January, 1861, by virtue of any lease or contract, shall, without the previous consent in writing of the landlord, being a person competent to grant

such licence, or of his agent duly authorised to act on his behalf, open, dig for any unopened mines, minerals, or quarries, or (except as hereinafter provided) remove the soil or surface or subsoil of the said lands, or permit or commit any other manner of w. thereon, unless the said lands shall have been, in express terms, leased for the purpose or with the permission of being so used and enjoyed."

Open Mines.—S. 27. "Where any lease shall be made on or after the first day of January, 1861, of lands containing any mines or minerals which at the time of the making of such lease shall have been opened or worked, it shall be lawful for the tenant thereof to enter upon and follow, and to work and dig for, and remove the said mines or minerals, whether they shall have been granted by name or not in the said lease, unless by the said lease it shall be otherwise provided."

Open Quarries.—S. 28. "Where any lease or demise shall be made on or after the first day of January, 1861, of lands containing any quarries or beds of stone, limestone, sand, marl, gravel, or clay, which at the time of the making of such lease shall have been opened or worked, it shall be lawful for such tenant, unless by the said lease otherwise provided, to work, dig for, and use such quarries or beds so far as may be necessary or useful for the purposes of agriculture and good husbandry, and the lawful erection or repair of any necessary buildings on the said lands, but not for any purpose of trade or manufacture, or for profit or sale, unless the right so to use and enjoy the same shall have been expressly granted in writing by the landlord being competent so to grant as aforesaid."

Mines Excepted.—S. 32. "Where lands shall be granted

or leased for any estate or interest, excepting thereout the mines and minerals upon the demised premises, it shall be lawful for the person entitled to the rent thereof, in fee simple, fee farm, fee tail, or for life, with immediate remainder to his own issue, to open, dig for, and work all mines and minerals found in or upon the said lands, and to carry away the ore thereof, or to lease the same to any person or persons for any term within the leasing power of such person in respect of mines and minerals; and such owner or his lessee shall have full liberty to enter on the said lands, and to build and make all houses, railways, tramways, and conveniences necessary for the purpose of mining, and to employ all streams on the said land not previously occupied, making to the tenant of the said lands such yearly or other compensation or allowance for the damage sustained by reason of such digging of the ore, or building the said houses, or otherwise using of the said lands or streams, as shall be agreed upon between the said parties, or in case they shall not agree, then such compensation or allowance as shall be ascertained by the chairman of the county upon a civil bill action brought for that purpose with the same incidents as in ordinary civil bill process. Provided, however, that no person shall search for, open, or work any mine or mineral, by virtue of this Act, on any spot of ground on which any church or other place of worship, graveyard, cemetery, or public school shall be situate, nor within thirty yards thereof, nor upon any spot of ground on which any house, outhouse, garden, orchard, or avenue shall be situate, without the consent of the tenant in possession thereof first had and obtained."

What are Minerals?—As to what is included in the term "minerals," when they are reserved in a lease or

grant, see *Hext v. Gill* (1872), 7 Ch. 699 C. A., where Mellish, L.J., said: "A reservation of minerals includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give a more limited meaning." It was held that china clay was included. So of coprolites in *A. G. v. Tomline* (1880), 15 Ch. D. 150 C. A.; granite obtained by open workings in *A. G. v. Welsh Granite Co.* (1887), 35 W. R. 617 C. A.; brick earth and clay in *Jersey v. Neath Union* (1889), 22 Q. B. D. 555 C. A.; limestone, whether got by quarrying or surface working, in *Fishbourne v. Hamilton* (1890), 25 L. R. Ir. 483. Whether a chattel, *e.g.*, a prehistoric boat, imbedded in the soil is a mineral, *qu. Elwes v. Brigg Gas Co.* (1886), 33 Ch. D. 562. And see the cases quoted in above authorities. Common clay is not reserved under the words "mines of coal, ironstone, slate or other minerals" in the Waterworks Clauses Act, 1847, s. 18. *Glasgow, &c., v. Farie* (1888), 13 A. C. 657.

FIXTURES (a).

General Principle.—In Co. Lit. 53 *a*, it is said: “If glass windows (though glazed by the tenant himself) be broken down or carried away, it is w., for the glass is part of his house. And so it is of wainscot, benches, doors, windows, furnaces, and the like, annexed or fixed to the house, either by him in the reversion or the tenant.” However, the severity of this rule has been somewhat relaxed by subsequent decisions, and the articles for ornament and convenience, which have been held removable, are according to the summary in the last edition of Woodfall’s “Landlord and Tenant,” “hangings, tapestry, and pier glasses, whether nailed to the walls or panels or put up in lieu of panels, cornices, marble and other ornamented chimney - pieces, marble slabs, window - blinds, wainscots fixed to the wall by screws, grates, ranges, and stoves, although fixed in brickwork, iron backs to chimneys, beds fastened to the wall or ceiling, fixed tables, furnaces and coppers, pumps, mash-tubs and fixed water-tubs, coffee and malt-mills, cupboards fixed with holdfasts, bookcases standing on brackets and screwed to the walls, clock cases, iron ovens and the like.” But only where no substantial damage is done to the freehold or the articles removed.

Substitution.—Where the removed article is in sub-

(a) See the works by Mr. Amos and Mr. Brown.

stitution for a former one, the former (or a similar one) must be replaced, unless it was completely worn out.

Exceptions in favour of Trade.—Two great exceptions to the old rule have been made, the one by judicial decisions in favour of trade, the other by statute in favour of agriculture. Now all trade fixtures brought on the land, which can be removed without destroying the soil, albeit the surface may be disturbed, may be removed. The last important case on the subject is *Ward v. Dudley* (1887), 57 L. T. N. S. 20, before Chitty, J., where the following buildings erected for the purpose of trade were held removable—engine houses, blast furnaces, calcining kilns, gas-pipes, fixed power machinery, sleepers and rails on a permanent way, fixed hauling engines and their sheds, weighing machines, &c. ; but not workshops of permanent structure. A tenant for life of open mines has the right of working them together with the chattels employed therein, and so far as these are properly consumed, he takes an absolute interest. But he may not break up such as are useless, and those which he repairs or improves still belong to the estate. There is no difference between the law of landlord and tenant and that of tenant for life and remainderman as regards the removal of fixtures.

And Agriculture.—In the leading case of *Elwes v. Mawe* (1803), 2 Sm. L. C., it was established that the privileges attaching to trade fixtures did not extend to agriculture, and so to remove this disability several enactments were passed, for by 14 & 15 Vict. c. 25, s. 3, as to agricultural holdings it was enacted that “if any tenant of a farm or lands shall, after the passing of this Act, with the consent in writing of the landlord for the time being, at his own cost and expense, erect any farm-building, either detached or otherwise, or put up any other

building, engine, or machinery, either for agricultural purposes or for the purposes of trade and agriculture (which shall not have been erected or put up in pursuance of some obligation in that behalf), then all such buildings, engines, and machinery shall be the property of the tenant, and shall be removable by him, notwithstanding the same may consist of separate buildings, or that the same or any part thereof may be built in or permanently fixed to the soil, so that the tenant making any such removal do not in anywise injure the land or buildings belonging to the landlord, or otherwise do put the same in like plight and condition, or as good plight and condition, as the same were in before the erection of anything so removed. Provided nevertheless, that no tenant shall, under the provision last aforesaid, be entitled to remove any such matter or thing as aforesaid without first giving to the landlord or his agent one month's previous notice in writing of his intention so to do; and thereupon it shall be lawful for the landlord, or his agent on his authority, to elect to purchase the matters and things so proposed to be removed, or any of them, and the right to remove the same shall thereby cease, and the same shall belong to the landlord; and the value thereof shall be ascertained and determined by two referees, one to be chosen by each party, or by an umpire to be named by such referees, and shall be paid or allowed in account by the landlord who shall have so elected to purchase the same."

38 & 39 Vict. c. 92 (1875).—This s. 3 has not been repealed, though to a great extent it has been superseded by the Agricultural Holdings Acts, 1875 and 1883, by the first of which (38 & 39 Vict. c. 92), s. 53, "Where after the commencement of this Act a tenant affixes to his holding any engine, machinery, or other

fixture for which he is not under this Act or otherwise entitled to compensation, and which is not so affixed in pursuance of some obligation in that behalf or instead of some fixture belonging to the landlord, then such fixture shall be the property of and be removable by the tenant.

“ Provided as follows :

- “ 1. Before the removal of any fixture the tenant shall pay all rent owing by him, and shall perform or satisfy all other his obligations to the landlord in respect of the holding.
- “ 2. In the removal of any fixture the tenant shall not do any avoidable damage to any building or other part of the holding.
- “ 3. Immediately after the removal of any fixture, the tenant shall make good all damage occasioned to any building or other part of the holding by the removal.
- “ 4. The tenant shall not remove any fixture without giving one month's previous notice in writing to the landlord of the intention of the tenant to remove it.
- “ 5. At any time before the expiration of the notice of removal, the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture comprised in the notice of removal, and any fixture thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay the tenant the fair value thereof to an incoming tenant of the holding; and any difference as to the value shall be settled by a reference under this Act, as in case of compensation (but without appeal).

“But nothing in this section shall apply to a steam-engine erected by the tenant, if, before erecting it, the tenant has not given to the landlord notice in writing of his intention to do so, or if the landlord, by notice in writing given to the tenant, has objected to the erection thereof.”

46 & 47 Vict. c. 61 (1883).—The Act of 1883 applies to the following holdings only, viz., “Holdings, either wholly agricultural or wholly pastoral, or partly agricultural and partly pastoral, or wholly cultivated as market gardens, held under a landlord for a term of years or for lives, or for lives and years, or from year to year by a tenant holding no employment under such landlord” (*b*), and it is enacted by s. 34: “Where after the commencement of this Act a tenant affixes to his holding any engine, machinery, fencing, or other fixture, or erects any building for which he is not under this Act or otherwise entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf or instead of some fixture or building belonging to the landlord, then such fixture or building shall be the property of and be removable by the tenant before or within a reasonable time after the determination of the tenancy.

“Provided as follows:

- “1. Before the removal of any fixture or building the tenant shall pay all rent owing by him, and shall perform or satisfy all other his obligations to the landlord in respect to the holding.
- “2. In the removal of any fixture or building the tenant shall not do any avoidable damage to any other building or other part of the holding.
- “3. Immediately after the removal of any fixture or

(*b*) *Lely & Pearce's Agricultural Holdings*, p. 18.

building, the tenant shall make good all damage occasioned to any other building or other part of the holding by the removal.

- “ 4. The tenant shall not remove any fixture or building without giving one month's previous notice in writing to the landlord of the intention of the tenant to remove it.
- “ 5. At any time before the expiration of the notice of removal the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture or building comprised in the notice of removal, and any fixture or building thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay the tenant the fair value thereof to an incoming tenant of the holding; and any difference as to the value shall be settled by a reference under this Act, as in case of compensation (but without appeal).”

50 & 51 Vict. c. 48 (1887). — By the Allotments Act (1887), c. 48, regulating the letting of allotments by sanitary authorities, it is provided by s. 7 (5) that “No building other than a tool-house, shed, greenhouse, fowl-house, or pig-sty, shall be erected on any part of any allotment, and if any building other than as aforesaid is so erected the sanitary authority shall forthwith pull down such building and sell and dispose of the materials thereof, and the proceeds of the sale shall be applicable in like manner as the rent of the allotment. If any building so allowed to be erected is erected upon an allotment, then at the end of the tenancy neither the sanitary authority nor the incoming tenant shall be bound to take any such building or pay any compensation therefor; but the

outgoing tenant shall be at liberty, before the expiration of his tenancy, to remove the same, and, if he fails so to do, the sanitary authority may pull down the building and dispose of the materials, and apply the proceeds in like manner as if it were a building prohibited to be erected." This s. 7 applies to land let in allotments by a Parish Council (Local Government Act, 1894, c. 73, ss. 9 (13), 10 (6)), " Provided that the Parish Council

" (b) May permit to be erected on the allotment any stable, cowhouse, or barn ; and

" (c) Shall not break up, or permit to be broken up, any permanent pasture, without the assent in writing of the landlord."

See " Landlord and Tenant," *infra*.

55 & 56 Vict. c. 31 (1892).—By the Small Holdings Act, 1892, c. 31, County Councils are empowered to acquire land for letting in small holdings of from one to fifty acres, or if larger, of no greater annual value than fifty pounds. Such small holdings are held upon the following conditions (*inter alia*) :

" S. 9 (d). That not more than one dwelling-house shall be erected on the holding.

" (e). That any dwelling-house erected on the holding shall comply with such requirements as the County Council may impose for securing healthiness and freedom from overcrowding.

" (g). In the case of any holding on which, in the opinion of the County Council, a dwelling-house ought not to be erected, that no dwelling-house shall be erected on the holding without consent of the County Council."

JUSTIFIABLE WASTE.

Trivial.
Title.

Meliorating.
Damages.

WHERE the w. is of a trivial nature, the Court may either refuse to enter judgment or may order judgment to be entered for the defendant. So it is said in Co. Lit. 54 a: "There is w. of a small value, as Bracton saith, *Nisi vastum ita modicum sit propter quod non sit inquisitio facienda*. Yet trees to the value of 3s. & 4d. hath been adjudged w., and many things together may make w. to a value." So 2 Rolle Abr. 824; see *King v. Fitch*, *infra*, p. 129. The note to Coke says: "It ought to be to the value of 40d. at the least," and refers to *Thore v. Thomas* (1368), Noy (a), p. 4, where the damages were found to be one penny. By the Court "that no judgment shall be entered. By Anderson, J., the value of w. shall be to 40d. at the least." And see Com. Dig. Action on the Case (B).

Barret v. B. (1634), Hetley 36, is a case very often cited on account of the proposition of Richardson, C.J.: "The law will not allow that to be w. which is not

(a) The learned editor says, as to Noy's reports: "Though the book is known by the name of that very learned lawyer, yet there is not the least reason to suppose that such a loose collection of notes was meant by him for the public eye."

anyways prejudicial to the inheritance." Then comes *Mollineux v. Powell* (1730), in n. (F), 3 P. Wms. 268 : "If the w. be of a trivial nature, and *a fortiori*, if it be meliorating w., as by building on the premises, the Court will not enjoin ; nor if the reversioner or remainderman in fee be not made a party, who possibly may approve of the w." (b) Again, we have *Dench v. Bampton* (1799), 4 Vesey 700, where the Court refused an injunction at the suit of a lord of the manor, and left him to his legal remedy by forfeiture presented by the homage.

Harrow School v. Alderton (1800), 2 Bos. & P. 86, comes next, where the Court gave leave to the defendant to enter judgment for himself, and so avoid forfeiture, the jury having assessed the w. at $\frac{3}{4}$ d. And see *Young v. Spencer* (1829), 10 B. & C. 145.

In *Barry v. B.* (1820), 1 J. & W. 651, a remainderman sought to restrain his father, the life tenant, from committing acts of w. ; "the most considerable of which were the cutting down a few elms of trifling value, and taking down part of a garden wall, which the defendant represented to have been done with a view to improvement." Eldon, L.C., said that the defendant could not excuse himself on the ground that the w. "was productive of beauty and improvement. I admit also, that a small degree of w. (I do not say the smallest), manifesting an intent to do more, will be sufficient for the Court to act upon ; but it will look at it in the manner in which the subject is viewed by the Courts of Law, and there the extent of the w. done is considered very material." A subsequent application was also refused as the defendant

(b) See *Jesus College v. Bloom* (1745), 3 Atk. 262 ; *Wilson v. Bragg* (1742), 8 Bacon 428.

justified a small cutting on the ground of benefit to the remaining trees, and application of the wood in repairing the fences.

In *Doe v. Burlington* (1833), 5 B. & Ad. 507, a customary tenant had pulled down a ruinous barn without any intention of rebuilding it, though it was afterwards rebuilt by him. The landlord sued for ejectment from ten messuages on the customary condition of tenancy that the tenant should do no w. The jury found that no damage had been done to the property. On the defendant moving for a nonsuit the Judges said: "We are of opinion that the pulling down of a barn, taken absolutely, is such w. as subjects the copyhold tenant to a forfeiture. But there is another principle applicable to w., *i.e.*, the smallness of value, and there are a great number of old authorities to say, that if the value be very small, the consequences of w. do not attach. . . . There is no authority for saying that any act can be w. which is not injurious to the inheritance, either, first, by diminishing the value of the estate, or, secondly, by increasing the burden upon it, or, thirdly, by impairing the evidence of title."

And cf. *Redfern v. Smith* (1823), 1 Bing. 382.

In *Lambert v. L.* (1840), 2 Ir. Eq. R. 210, Plunket, L.C., dismissed, as being beneath the dignity of the Court, a bill to restrain w. where about six timber trees had been cut to the value of about £7 10s., saying the plaintiffs could have their action for damages if they pleased. And in *Doran v. Carroll* (1860), 11 Ir. Ch. 379, a petition for account, injunction, and damages was dismissed as a case in which a jury would only give nominal damages, a garden wall having been pulled down and re-erected in a more convenient spot.

The doctrine laid down by Lord Eldon in *Barry v. B.*,

u.s., that a small injury, if continued, will be restrained, was followed by Brady, L.C., in *Hunt v. Hodges* (1848), 1 Ir. Jur. (O.S.) 33, where a stable yard and one of the gardens, belonging to a house with about fourteen acres of ground attached, were turned into a lead factory and furnace, the learned Judge saying: "I cannot refuse this measure of relief; if I did, what is to prevent the defendant from covering the whole premises with factories of a similar size?" A little earlier he had said: "Now I cannot say whether a jury in this case would give damages, but a Court of Law would say, that this without doubt was w. We have an act, which is w. at law, established so as to manifest an intention to continue it."

Again, in *Birch-Wolfe v. Birch* (1870), 9 Eq. 683, James, V.C., refused to apply the doctrine of *Garth v. Cotton*, on account of the triviality of the collusive w.

Lastly, Lord Blackburn in *Doherty v. Allman* (1878), 3 App. Cas. at p. 733, said: "It is perfectly clear that in an action of w. you cannot recover nominal damages only, you must get real damages. The jurors must not find for you unless they think there is substantial and real damage." And after quoting some of the above cases he proceeds: "Blackstone says 12d. (3 Com. 228), but what the value of that 12d. was you must go back to the days of King Richard to ascertain." See S. C. *infra*, p. 131. There the plaintiffs were reversioners subject to terms of about nine hundred and ninety years; as in *Strother v. Barr* (1828), 5 Bing. at p. 153, Best, C.J., held: "If the plaintiffs would have no reversion for one thousand years, I doubt whether they would have such an interest as to maintain an action for an injury to so remote a reversion. To support an action of this sort, there must be some damage, and it is impossible to prove any damage in the

case I have stated." Cf. *Ferguson v. Cristall* (1829), ib. p. 305. So *Bubb v. Yelverton* (1870), 10 Eq. 465. In cases other than of w., the Court will not act where the amount is beneath its dignity. *Bruce v. Taylor* (1741), 2 Atk. 253; *Whittingham v. Wooler* (1817), 2 Swans. 428.

Probably no amount is beneath the dignity of a County Court.

But where w. is assigned in several places, it is usual and proper to take a general verdict as to the whole, and not a separate one as to each place, though these would separately be trivial. *King v. Fitch* (1635), Cro. Car. 414, 452.

Damage Repaired.—In *Job v. Potton* (1875), 20 Eq. 84 at p. 99, Bacon, V.C., held that the licensee of two out of three co-tenants of a coal mine was not a trespasser, and that he having repaired the injury to the surface before action brought, was not liable therefor. See *Arg.* 2 Rolle R. 283. So w. by an incumbent is not punishable in an Ecclesiastical Court, if repaired before action brought. *Cox v. Ricraft* (1757), 2 Lee 373. This defence would not formerly have availed a stranger, if he would be trespassing by entering to repair the injury. *Taylor v. Stendall* (1845), 7 Q. B. 634.

As to restoring the place wasted before verdict, see *Queen's Coll. Ox. v. Hallett* (1811), 14 East 489; and as to pleading new matters of defence, arising pending the action, see Rules of the Supreme Court, Order 24, Rule 2.

TITLE.

It seems fair nowadays, as a matter of arrangement, to treat w. founded on injury to title as a possible variety

of trivial w. Not that there may not be, even now, cases in which injunction may be granted or damages awarded on this ground; but that, in by far the largest number of instances, confusion of title is so slight as to be disregarded.

Old Law.—In older times this w. was a matter of great importance, and the text-books and cases frequently mention it; thus in 2 Rolle Abr. 815, pl. 8, the conversion of meadow to arable was held w. because of the injury to title. *Darcy v. Askwith* (1616), Hobart 234. "It alters the evidence of title; a reason which I am not disposed to treat lightly. . . . It is a matter of daily practice in this Court to amend fines and recoveries on account of mistake in the description of land, and the ground of such amendments is that these documents certify the title and identify the land by reference to the uses to which it is applied." Per Tindal, C.J., in *Simmons v. Norton* (1831), 7 Bing. 640.

As late as 1829 a new trial was granted at the instance of a plaintiff in a case where the jury found damages at one shilling, on the ground that the question of injury to the reversionary title by opening a new street-door had not been left to them. *Young v. Spencer*, 10 B. & C. 145.

The Change.—The turn of the tide is perhaps marked by *Huntley v. Russell* (1849), 13 Q. B. 572, where it was held that the pulling down of a barn attached to a house and rebuilding a better a mile away from the former site, but in a more convenient position for the farming business, was not w. "The evidence of title could in no way be affected by taking down a barn adjoining the house, that house being still standing." So in *Jones v. Chappell* (1875), 20 Eq. 539, Jessel, M.R., said (the plaintiff in the case holding a lease of a plot of land adjoining the defen-

dant's leasehold, from the same landlord but by a later deed, and seeking to restrain the defendant from building): "You may prove an injury in the sense of destroying identity, by what is called destroying evidence of the owner's title, and that is a very peculiar head of the law, which has not been extended in modern times. In the lease in question, not only is there no covenant restraining the lessee from erecting buildings, but there is a covenant that he will keep all future buildings and erections in repair, showing that the erection of buildings was contemplated. Therefore, so far as the lease goes, it is almost an implied licence to erect buildings. But, independently of licence, we must consider that if there had been w. at law, the landlord could, before the abolition of the action for w., have brought an action or obtained an injunction, and that he would be entitled to the latter now if the injury were sufficiently serious. It is plain to my mind, looking at the nature of the works and at what the defendant is doing, that the lessors could neither have done the one formerly, nor could they do the other now. In fact, I am satisfied it is not w."

Present Law.—The leading authority on this point is now *Doherty v. Allman* (1878), 3 App. Cas. 709, the main facts of which are set out *infra*, p. 139, where an application was made for an injunction, which was granted by the Court of first instance, but refused in the Court of Appeal. Lord O'Hagan said (p. 725): "I think that the judgment in the Court below in the first instance went very much upon the view that the w. here had the effect of destroying the evidence of title. A great deal was said also at the Bar upon that subject, and a great deal certainly was said by the learned Judge who pronounced the original judgment in this case. Now I

cannot myself see that there is anything at all in that. I do not think that in the particular circumstances of this case there is any interference with the evidence of title. You may do what you please with this particular building (according to the plans and views of the parties connected with it), and yet not destroy any evidence of title at all. The building is to be modified—is to be improved—but it is to remain where it was, it is to be of the same proportions, it is to have the same position, it is to have the same surroundings; and I cannot see how what is proposed to be done would injure or affect the appellant's evidence of title. Independently of that, I think we must take this into account, that owing to the circumstances in which property is now situated in this country, in Scotland, and in Ireland, evidence of title of this kind is not at all of the same importance as it was in other times and other circumstances. When you have an Ordnance Survey, when you have a Registry of Deeds, when you have a system of conveyancing, the value of evidence of title, of a place of this sort retaining its particular position, is very sensibly diminished. At all events, I see no reason upon that ground to hold that there has been any diminution of the evidence of title of which the lessor of these premises can properly complain." Then Lord Blackburn continued: "I will only say one word about the alteration of evidence of title. I can perfectly understand that five or six hundred years ago that was an extremely serious matter, that where the evidence of title depended entirely upon the memory of witnesses, to change a meadow into a wood or a wood into a meadow would have been a serious matter as far as regards the evidence of title. After a few years it might be very difficult to trace which had been which. But nowadays,

when there are Ordnance Surveys, and where, as in Ireland, there is a Court especially dealing with the titles to estates, giving titles, and where the property is marked out on a map, which map can be identified with the Ordnance map—and these maps it may well be supposed will continue to exist and may be referred to to the end of the term—any damage in regard to evidence of title is quite wild and chimerical, or is at least merely nominal. I think, if it is put in that way, it would scarcely be gravely said that a Court of Equity should grant an injunction, or that the Court should act upon the rules of a former time and grant an injunction, because of a theoretical absurdity such as a supposed injury to title.”

On the other hand may be quoted *Maunsell v. Hort* (1877), 11 Ir. Eq. R. 478, where premises *demised as a stable and coach-house*, belonging to a messuage demised therewith, but separated by several houses, some of which had since the demise become shops, were altered into a butcher's shop. Sullivan, M.R., said (p. 491): “I think a case such as the present, where the coach-house and stable do not form a continuation of the house, but are detached from it, out of view, and at some distance, has an additional element of much force, namely, the possible confusion of the evidence of title, which is a very important matter to be considered where the conversion is illegal and brought within the definition of w.” Apparently the question of injury to title was the only ground for holding that w. had been committed; and this was unnecessary to the decision, as the stable and coach-house were demised *eo nomine*, and the lessee had covenanted to repair and deliver up in good condition.

MELIORATING WASTE.

Principle.—It follows by an *a fortiori* argument that if a tenant be not punishable for trivial w., neither is he for meliorating, and this is established by abundance of authority, though it is sometimes extremely difficult to decide whether premises have been bettered or depreciated.

A very early case is *Maleverer v. Spinke* (1538), Dyer 35 *b*, where w. was assigned in cutting four ashes. The defendant pleaded *inter alia* “that they grew upon one acre of land of the aforesaid tenements, which acre has been used from time immemorial to be arable, and for the melioration of the land for ploughing and sowing and for the maintenance of husbandry he cut down, &c.” The judgment went: “It seems that it is bad, for the termor cannot do a tort to the inheritance for his own convenience and advantage; for he cannot convert land into wood, or wood into arable land, or convert meadow into arable land, and if he do it is w.; but perhaps he may root up bushes, furze, and thorns growing upon the land, for melioration, for that is good husbandry, and the common law gives such things to the termor for fuel.” See *Coppinger v. Gubbins*, *infra*, p. 136.

Old Law.—We may well pass by *Greene v. Cole* (1670), 2 Wms. S. 644, with very brief notice. According to the fuller report in 1 Lev. 309, one Forth, who was lessee of Greene, who was lessee of Cole, had pulled down a brew-house and built a number of small tenements in lieu thereof, thereby improving the rent from £120 to £200 a year. Although the jury found in favour of Forth, Hale, C.J., resolved it to be w. notwithstanding the improvement. In like manner, in *London (City of) v. Greyme* (1607), Cro. Jac. 181, it was held w. to convert

a manual mill into a horse-mill, "although it is for the lessor's advantage, and so it is to convert a corn mill to a fulling mill." Doubtless neither of these cases would be followed to-day. And *Brydges v. Kilburne* (1792), 5 Vesey 689 n., may be referred to, where a logwood mill was altered into a cotton mill of great value, and Buller, J., refused an injunction as the landlord had stood by with notice that the expense was being incurred; and in *Jackson v. Cator* (1800), 5 Vesey 688, a landlord who had reserved trees, &c., was restrained from cutting those ornamental to a pleasure ground, which his tenant had, with his acquiescence, laid out on part of his holding.

For the sake of convenient reference we will now take all the cases relating to the improvement of ancient meadow together.

Ploughing Meadow.—"In such places where by the custom of the country the ploughing of meadow is good husbandry and for the melioration of the meadow, so to plough it is not w." 2 Rolle Abr. 814.

"If a lessee dig trenches to let the water escape, by which the meadow is meliorated, this is not w," ib., and *Darcy v. Askwith*, pp. 10, 138. So *Altman's Case* (1578), cited in 22 Viner, W. p. 449 (H).

In *Anon.* 2 Leon. 174, pl. 210 (1587), "Note, it was said, That the division of a great meadow into many parcels, by making of ditches, is not w., for the meadow may be the better for it, and it is for the profit and ease of the occupiers of it. And by Wyndham & Rhodes, J.J.: If a termor converteth a meadow into a hop garden, the same is not w., for it is employed to a greater profit, and it may be a meadow again. Periam, J.: Although it be a greater profit, yet it is also with greater labour and charges. And the conversion of a meadow into an orchard

is w., although it may be to the greater profit of the occupier." But in *Worsley v. Stuart* (1711), 4 Brown P. C. 377, 22 Viner 441, an injunction was upheld to prevent the burning, breaking, &c., of down-land, although the defendant claimed that he was improving the estate, the respondent on the contrary alleging injury through want of foldage for sheep.

But, "If a *commoner* make a trench in the soil, whereby the soil is made better, yet he shall be punishable." Dyer 36 b. The reference is to 1 Rolle Abr. 406, where it appears that the commoner made the trench to carry off the water. The reason given is that the commoner has nothing to do with the soil, but only to take the grass with the mouths of his beasts.

On the other hand is an *obiter dictum* in *Joley v. Stockley* (1825), 1 Hogan 247, where Sir Wm. McMahon, M.R., said: "If it was ancient meadow in point of law, the tenant cannot be allowed to break it up, though it had subsequently become mossy, and would be so much improved by tillage." See on p. 21, &c.

Coppinger v. Gubbins (1846), 9 Ir. Eq. R. 304; 3 J. & L. 397, is an important case in illustration of the principle laid down in *Maleverer v. Spinke*, that a termor cannot commit w. for his own advantage. Here a lessee for lives renewable for ever at a large rent covenanted in his lease to maintain and repair, and the lease further included liberty to the tenant and under-tenant to cut a named bog as was previously accustomed "for his and their consumption." Defendant cut turf for sale on another bog and contended that Massy, who had sold to Coppinger previous to the lease, had been accustomed to do so, and he was to hold and enjoy in the same manner as before the lease. It was proved that the

annual value of the lands had been increased by £200 or £300 by cutting the turf and laying down in grass. Lord Chancellor Sugden said: "As to the question whether this is a case of meliorating w. in which the Court should not grant an injunction, it is said, that the property cannot be improved until the turf is removed; that there is first black turf, then brown, and thirdly marl; and that the two first must be removed in order to improve the property by cultivation, and that the lessee has in fact greatly improved the property by removing them and cultivating it, and that it is now producing crops. It is perfectly clear that the Court could not allow the committing of w. merely on the ground that the party committing it has done other acts which are beneficial to the property. . . . If by the removal of the turf an improvement necessarily followed, there might be some ground for saying that the Court should not interfere; but it depends on the option of the lessee whether or not he will afterwards improve the ground from which the turf has been cut. The act, therefore, may be right, in which case the Court would not interfere, or it may be a wrong, against which the Court would interfere. I cannot, therefore, allow him to call that a right against which the Court will not interfere, or to commit w., merely on his assertion that he will improve the land after the w., or that the ground is not capable of improvement until he has committed the w.—until he has carried off the turf, to the value perhaps of £300 or £400 a year. I think, therefore, that this is w. in the first instance, and an actual damage to the inheritance, and that it cannot be treated as a benefit, on the supposition that the land may be improved."

In *Harris v. Ekins* (1872), 26 L. T. 827, a "tenant for

life leased parts of the land at very low rents with liberty for the tenants to get and carry away the turf, but under the obligation to level the land and prepare it for agricultural purposes. The value of the turf taken away was estimated at over £1,000, but it appeared from the evidence that, as agricultural land, the land with the turf upon it was worth £10 per acre, but by the removal of the turf had increased in value to £40 or £50 per acre." Bacon, V.C., held in favour of the tenant for life. No cases appear to have been cited.

Buildings.—In *Jones v. Chappell* (1875), 20 Eq. 539, cited *supra*, p. 130, the tenant relied upon the law as laid down in Co. Lit. 53 a: "If the tenant build a new house it is w.;" but Jessel, M.R., said: "That is not the law at the present time. In Williams' Notes on Saunders, Vol. II. p. 652, it is said: 'It is a question whether it is w. to build a new house.'" And no doubt the question is really one of fact to be determined in each case. (See the Irish cases of buildings on agricultural holdings, p. 16.) And see *Mollineux v. Powell*, u.s., p. 126. And in *Darcy v. Askwith* (1616), Hobart, Case 296, it is said: "A lessee may build a new house where none was before, but that must be every way at his own charge; for he must neither take timber or other things wastable, neither to build or repair it, though it be never so needful . . . a new house betters and increaseth the inheritance." Cf. *Wild v. Stradling* (1674), Finch 135.

In 2 Rolle Abr. 815, pl. 22: "If a lessee of land makes a new house on the land where none was before, this is not w., for it is for the benefit of the lessor." In *Coppinger v. Gubbins* (*supra*), the Court said that an injunction would not be granted against meliorating w., e.g., building a

house. But see *Smyth v. Carter* (1853), 18 Beav. 78, where an interlocutory injunction was granted prohibiting a tenant (whether from year to year or in perpetuity was disputed) from pulling down in order to rebuild a different and more expensive building. However, in *Doherty v. Allman* (1878), 3 A. C. 709, it was held that no injunction should be granted against meliorating w.

Doherty v. Allman (1878), 3 A. C. 709, is now the leading authority on this branch of the subject, and there the defendants were sub-lessees for 750 years at a rent of £46 8s. 1d. of premises demised by predecessors of the plaintiff by two leases, one for 999 years from 1798, and the other for 988 years from 1824, both of them containing a covenant to repair. The immediate sub-lease under which the defendant held demised the premises as "a large storehouse and kiln, also the several dwelling-houses and out-houses and yard back and adjoining the said storehouse and kiln, bounded, &c." Previous to the original lease being granted, some large buildings had been erected, which had been used as store warehouses, and afterwards as artillery barracks and dwellings for married soldiers, but they were now unoccupied and were said to be falling into decay. The respondent proposed to change many of these stores into dwelling-houses, and the appellant applied for an injunction "alleging the proximity of the projected houses to his private residence. Much evidence was given by the respondent to show that the alterations proposed to be made in the buildings would considerably increase their value."

Lord Cairns (p. 717) said: "The property demised, so far as it consisted of buildings, consisted of stores—and, as we understand, stores for storing corn. It is stated in evidence, and does not appear to be a matter of controversy

between the parties, that since the date of these leases a considerable change has occurred with reference to the demand for buildings of this description in the neighbourhood of Bandon ; and it is stated, and does not appear to be seriously controverted, that in the town of Bandon, which seems to lie at a lower level than where these stores are built, there is now a considerable—perhaps an exuberant—supply of store buildings, access to which, or facility of carriage, is greater than to this higher ground, and that, therefore, there is serious difficulty in obtaining a tenant for this property used as stores. Under these circumstances, the respondent has had specifications prepared which appear to be prepared in a careful, proper, and businesslike way, and he has had a contract made in accordance with those specifications, by which the external walls of this building are to be retained, and those external walls, where one part of the building is of a lower height than the rest, are to be raised, so that the building may be of a uniform height ; internal changes are to be made, internal walls are to be introduced, the flooring is to be altered in its level, and six dwelling-houses are to be made out of this which now is one long store.”

And again, at p. 723 : “ In the present case it appears to me to be extremely doubtful whether any jury could be found, who, after this work shall be executed in the way that is proposed, would say that any damage had been done by the work to the inheritance. And I doubt, farther, whether it must not be taken as clear from the evidence here that any jury, or any tribunal, judging upon the question of fact, would not say that, if there be technically what in the eye of the common law is called w., still it is that ameliorating w. which has been spoken of in several of the cases cited at the Bar. That which is done,

if it be technically w.—and here again I will assume in favour of the appellant that it is technically according to the common law, w.—yet it seems to me to be that ameliorating w. which, so far from doing injury to the inheritance, improves the inheritance. Now, there again the course which the Court of Chancery ought undoubtedly to adopt would be to leave those who think they can obtain damages at Common Law to try what damages they can so obtain. Certainly, I think here again, the Court of Chancery would be doing very great injury to the one side for the purpose of securing to the other that slightest possible sum which would at Common Law be considered the full equivalent to which he was entitled.”

This was followed by the Divisional Court in *Re McIntosh, &c.* (1891), 61 L. J. Q. B. 164.

Charity Land.—The Court will not interfere except upon the clearest evidence to prevent a charity near London from letting its meadow land on building lease; there appearing nothing improvident, but rather remunerative, in the change. *A. G. v. Foundling Hospital* (1793), 2 Ves. jun. 42. *Doe v. Bond* (1826), 5 B. & C. 855, 8 D. & R. 738 (*infra*), may also be referred to.

Settled Land Act, 1882. Improvement of Land Act, 1864.—Now a tenant for life under a settlement has power to grant a building lease for any term not exceeding 99 years. See Settled Land Act, 1882, ss. 6–10. And another argument in favour of building may be gathered from the Improvement of Land Act, 1864. See Appendix.

Pleading.—*Simmons v. Norton* (1831), 7 Bing. 640, decided that the defence of amelioration was to be specifically pleaded, Tindal, C.J., saying: “One of the reasons given is, that it alters the evidence of title; a reason which I am not disposed to treat lightly. . . . In ancient

meadow, years, perhaps ages, must elapse before the sod can be restored to the state in which it was before ploughing. The law, therefore, considers the conversion of pasture into arable as *prima facie* injurious to the landlord on these two grounds at least. I do not say that that which is *prima facie* w. may not be altered in its character, if under peculiar circumstances it should appear to have been done for the melioration of the land, but if that be so, it must be expressly stated on the record."

Damages, Mitigation of.—In *Redfern v. Smith* (1823), 1 Bing. 382, the life tenant cut trees valued at £37 out of a total on the property of £50, but had cut none within the last five or six years. The plaintiff's witnesses admitted that many had been cut for the benefit of the estate. The Judge directed the jury that if they esteemed the felling of the trees to have been injurious to the estate they should find for the plaintiff; if they thought the felling not injurious, but *bond fide* with a view to benefit the estate, they should find for the defendant. They found for the defendant. A new trial was granted without giving any opinion, the Court saying: "We doubt whether the whole of this case has been sufficiently understood."

In *Doe v. Bond* (1826), 5 B. & C. 855, the defendant was tenant under a lease of a building one storey high, occupied as two tenements, and of a back linhay or bullock house and a garden. The superior tenant, under whom the defendant held, razed the building of two tenements, and converted it into five separate dwellings. He then pulled down the linhay and was proceeding to erect three cottages. By a clause in the lease the landlord had power of re-entry on w. done to the value of ten shillings. No question was left to the jury as to the

amount of w. committed, so although buildings of a different nature were substituted, and the jury had found for the plaintiff, Bayley, J., said: "It was possible that the value of the reversion might be increased by the alteration; it was, therefore, a question for the jury, whether w. to the value of ten shillings had been committed. And with the concurrence of the other Judges a new trial was ordered."

And see *Harrow School v. Alderton*, and *Meux v. Copley*, *supra*, pp. 126, 33.

Account Refused.—In *Birch-Wolfe v. Birch* (1870), 9 Eq. 683, James, V.C., refused to direct an account to be taken against the estate of a tenant for life who had committed trifling w., but had expended considerable sums in repairs, improvements, and additions.

Felling Timber. United States.—In this country many considerations arise, which *ex necessitate rei* cannot exist in an old and settled kingdom; and so we might well expect that the doctrine of w. in cutting down timber would not universally apply in America. Thus, as early as 1803, it was said in *Ward v. Sheppard* (1803), 2 Am. Dec. 625: "If lands are leased to a lessee in an uncultivated state, he must of necessity have the power to clear, otherwise the lease would be of no profit or advantage to him." Again, in *Jackson v. Brownson* (1810), 5 Am. Dec. 258, where there was a covenant against w.: "The covenant must be construed with reference to the state of the property at the time of the demise. The lessee undoubtedly had a right to fell part of the timber, so as to fit the land for cultivation, but it does not follow that he may with impunity destroy all the timber, and thereby essentially and permanently diminish the value of the inheritance. Good sense and

sound policy, as well as the rules of good husbandry, require that the lessee should preserve so much of the timber as is indispensably necessary to keep the fences and other erections upon the farm in proper repair. . . . The doctrine of w., as understood in England, is inapplicable to a new, unsettled country." Cf. *Findlay v. Smith* (1818), 8 Am. Dec. 733; *Johnson v. J.* (1835), 29 Am. Dec. at p. 88.

WITHOUT IMPEACHMENT OF WASTE.

Without Impeachment of W.

Tenant in tail.

*Tenant after possibility of issue
extinct.*

Executory Trusts.

*Tenant subject to executory devise
over.*

Meaning of Phrase.—"Without impeachment of w. (that is), without any challenge or impeachment of w., and by force hereof the lessee may cut down the trees and convert them to his own use. Otherwise it is if the words were 'sans impeachment per ascun action de wast,' for then the discharge extends but to the action, and not to the trees themselves, and in that case the lessor shall have them." Co. Lit. 220 *a*.

In *Lewis Bowles' Case* (1616), 11 Coke 83 *b*, Latch. 270, it is said in the 7th Resolution :

"The clause of 'without impeachment of w.' gives a power to the lessee, which will produce an interest in him if he executes his power during the privity of his estate, and therefore to examine it in reason (1) . . . 'sine impetitione' is without any manner of demand or impeachment. . . . But if the words had been 'absque impetitione vasti per aliquod breve de vasto' (*a*), then the action only

(*a*) Cf. *Anon.* (1560), Moore 18, pl. 64, where a covenant not to bring an action within two years was said

not to make the tenant unimpeachable. Wood's Inst. 74.

would be discharged, and not the property in the trees, but that the lessor after the fall of them might seize them (b). . . . (2) (Quoting Lit. fol. 82, s. 352) . . . which case directly proves that tenant for life without impeachment of w. has as great power to do w. and to convert it at his own pleasure as tenant in tail had, &c. (c). . . Lastly, it was resolved, that the said woman, by force of the said clause of 'without impeachment of w.', had such power and privilege; that though in the case at Bar no w. be done, because the house was blown down *per vim venti* without her fault, yet she should have the timber which was parcel of the house, and also the timber trees which are blown down with the wind; and when they are severed from the inheritance, either by the act of the party or of the law, and become chattels, the whole property of them is in the tenant for life, by force of the said clause of 'without impeachment of w.'"

As to severance by a stranger, see *infra*, p. 151.

Estate in Possession Only.—The clause only applies to an estate in possession (d), and a Court of Equity will restrain the cutting of timber by a punishable tenant during the continuance of a previous estate. *Lady Evelyn's Case*, cited in *Abrahall v. Bubb*, 2 Freem. 55; 2 Show. 69, and in 2 Swans. 172; *Fleming v. F.*, cited in *Garth v. Cotton*, q.v.; 3 Atk. 751. And see *infra*, p. 159.

But in *Saville v. S.* (1720), 2 Atk. 458, Tracy, J.,

(b) That this is the opinion which finally prevailed see a learned note to *Davis v. Marlborough*, 2 Swans. at p. 145.

(c, See *Minshal v. M.* (1662), 1 Rep. in Ch. 242; and 2 Rolle Abr. 835; 8 Bacon 412.

(d) Qu. what is the effect where a life tenant is restrained by the order

of the Court from cutting, and then dies? *Partridge v. Pawlett* (1744), Ridgway 254; for until actually severed, trees, &c., pass with the estate, though they may be under a contract for sale. *Liford's Case* (1615), 11 Coke 46 b; *Roberts v. R.* (1657), Hardre 96. See p. 159.

was of opinion that an over-riding term for raising portions did not prevent an unimpeachable tenant cutting and selling timber. See "Mortgage."

During the continuance of his estate, as an estate in possession, a tenant, unimpeachable, may enjoy the property to the same extent as a tenant in fee simple, although he may not commit any act which amounts to "equitable w.," q.v. *infra*, p. 166. He may, therefore, cut timber (*Smythe v. S. infra*, p. 182), open and work mines, plough ancient meadow (*Tracy v. T.* (1681), 1 Vern. 23; *Piers v. P.* (1750), 1 Ves. sen. 521; and see *Davies v. D.* (1840), 2 Ir. Eq. R. 414), and *infra*, p. 203.

He may repair with timber growing upon the ground. Co. Lit. 54 b.

Sub-Tenants.—Not only is the actual tenant for life dispunishable, but his own lessees are also, as between them and the remaindermen, *Bray v. Tracy* (1625), W. Jones 51. So in *Davies v. D.*, u.s., Pennefather, B., treated the dispunishable tenant as the substantial defendant in an action against his lessee, holding by a lease made under a power by which the lessee was not to be made unimpeachable, and refused an injunction. And see *Doe v. Ferrand* (1851), 20 L. J. C. P. 202, where a lease made under a similar power, recited in the deed, was construed as authorising w. only so far as the life tenant could authorise it. An ordinary power of leasing does not authorise a lease under which the lessee would be dispunishable. *Muskerry v. Chinnery* (1855), Ll. & G. temp. Talbot 182. A lease by a life tenant, unimpeachable, may except the trees, but in an assignment such an exception would be bad, as the life tenant would retain no estate on which the words "without impeachment of w." could operate (*Secheverel v. Dale* (1627),

Poph. 193); but qu. he would still have a life estate in the trees and might be dispunishable as to them and fell them, according to the opinion of Dyer, C.J., in *Dauntsey v. Southwell* (1560), Dyer 184 a, who, however, was in the minority against two other Judges.

Privity.—In *Lewis Bowles' Case* (1616), 11 Coke 79 b, p. 83 b, it is said: "The privilege is annexed to the privity of estate. If one who has a particular estate without impeachment of w., changes his estate, he loses his advantage. If a man makes a lease for years without impeachment of w., and afterwards he confirms the land to him for his life, now he shall be charged for w. . . . If a lease is made to one for the term of another's life, without impeachment of w., the remainder to him for his own life, now he is punishable for w., for the first estate is gone and drowned; so of a confirmation."

A lease by an unimpeachable life tenant and the reversioner, makes the lessee unimpeachable by the reversioner during the life, but not afterwards. *Nudigate's Case* (1564), Moore 72, pl. 196.

If a man seised in fee makes lease and then conveys the reversion to the use of himself for life, without impeachment of w., remainder in fee or tail, the latter upon the death of the life tenant can complain of w. done by the lessee during the life; otherwise if the tenant for life being dispunishable made the lease, for he alone could complain of the w. done in his life. *Bray v. Tracy* (1625), W. Jones 51, *sed quære* as to the first proposition.

Power or Trust for Sale.—In *Plymouth v. Archer* (1782), 1 Bro. C. C. 159, Thurlow, L.C., there was a devise of lands upon trust for sale and purchase of others, which, when purchased, were to be upon trust for defendant for life, without impeachment of w., the rents and profits of

the original land to be to the use of defendant for life until sale. Defendant was held not entitled to cut timber on the original lands, as otherwise he would have double w., and that rents and profits mean *annual* rents and profits. If there is only a power and no trust for sale, the life tenant, unimpeachable, is entitled to cut timber for his own benefit. *Wolf v. Hill* (1806), 2 Swans. 149 n. Where a life tenant, unimpeachable, has a power of sale over the estate and exercises it, he is not entitled to the sum paid as the value of the standing timber. *Doran v. Wiltshire* (1792), 3 Swans. 699, and so *Wolf v. Hill*, *supra*, and *Doe v. Phillips* (1841), 1 Q. B. 84, where a sale was effected under the Acts for redeeming the Land Tax.

To the same effect is *Cockerell v. Cholmeley* (1832), 1 Cl. & Fin. 60, where the House of Lords set aside a sale by trustees with power of sale, after the lapse of forty years, part of the bargain being that the price of standing timber should be paid to the unimpeachable life tenant, the payment being made under a mistake of law.

22 & 23 Vict. c. 35 (1859).—It was to meet such cases as these that it was provided by 22 & 23 Vict. c. 35, s. 13, that “where under a power of sale a *bonâ fide* sale shall be made of an estate with the timber thereon, or any other articles attached thereto, and the tenant for life or any other party to the transaction shall by mistake be allowed to receive for his own benefit a portion of the purchase money as the value of the timber or other articles, it shall be lawful for the Court of Chancery, upon any bill or claim or application in a summary way, as the case may require or permit, to declare that upon payment by the purchaser or the claimant under him, of the full value of the timber and articles at the time of sale, with such interest thereon as the Court shall direct, and the settlement of the said

principal moneys and interest under the direction of the Court upon such parties as in the opinion of the Court shall be entitled thereto, the said sale ought to be established ; and upon such payment and settlement being made accordingly, the Court may declare that the said sale is valid, and thereupon the legal estate shall vest and go in like manner as if the power had been duly executed, and the costs of the said application as between solicitor and client shall be paid by the purchaser or the claimant under him."

This section does not authorise sales previously defective, but supplies a means of ratifying them by a process somewhat expensive to the purchaser.

And the position of a tenant for life selling under the Settled Land Act, 1882, is the same, *In re Llewellyn* (1887), 37 Ch. D. 317 ; except that where the timber is sold apart from the land, he is entitled to one-quarter of the produce for himself, the other three-quarters going to the capital account (see App.). In this case the tenant also claimed under a power of cutting and appropriating decaying trees, but to this also he was not entitled, as the trees had not been severed and were sold as part of the inheritance.

Timber Estate.—*Burges v. Lamb* (1809), 16 Vesey 174, is an important case, as it shows that trustees who have power to purchase real estate should not invest in a timber estate ; and if they do, and the purchase is not impeached, the successive life tenants, though unimpeachable, are not entitled to cut all the timber.

But in *Jones' S. E.* (1855), 1 Jur. N. S. 817, Stuart, V.C., sanctioned the investment of £6,100, part of £140,000 Consols, in the purchase of an estate on which was £1,800 worth of timber, although the petitioner was tenant for life without impeachment.

Severance by a Stranger.—"It is now settled at law, that if a stranger cut down timber, or commit any other w., it belongs to the tenant for life who is dispunishable of w., and not to the remainderman in tail or in fee." *Anon.* (1729), *Moseley* 237, per Carter, M.R., but only if his estate is in possession, *Pigot v. Bullock* (1792), 1 Ves. jun. 479, 484. And see p. 146. So in *Pyne v. Dor* (1785), 1 T. R. 55, 1 New R. 25, 12 East 219, it was held that a tenant in tail cannot maintain an action of trover for timber cut in the lifetime of the life tenant, unimpeachable, and whether cut with or without his consent, for trover is founded on property, and this in severed trees is in the life tenant. See *Secheverel v. Dale* (1627), Poph. 193, *Lewis Bowles' Case* (1616), 11 Co. 79 b.

Minerals.—In the case of *In re Barrington* (1886), 33 Ch. D. 523, Kay, J., held that where minerals are wrongfully gotten by a stranger, they or their value belong to the existing dispunishable life tenant in possession, in the same way as does timber cut by a stranger, and where a lessee of the minerals gave notice to a railway company of his intention to work the coal underlying their permanent way, and the company purchased under the Lands Clauses Act, 1845, a decision was necessary as to who was entitled under the 74th section to the compensation money, representing the lessor's interest. "I quite agree that under that section it is the duty of the Court to consider all the circumstances, and if the coal for which compensation was thus received was of such an extent that by no possibility it could be gotten during the lifetime of the existing tenant for life, it seems to me that it might be a circumstance which the Court might have to regard in determining the relative rights of the tenant for life and the remainderman; but nothing of that kind occurs here, and

I am of opinion that in this case the tenant for life is entitled to . . . that part of the compensation which is allotted to the lessor."

And see Index as to trespass by a stranger generally.

Construction.—In *Leake v. Eyre* (1609), Cro. Jac. 216, it was decided that "sine impedimento vasti" is an equivalent of "sine impetitione vasti."

The use of the words "without impeachment of w." "is a mark of the intent to give such an estate as would be punishable for w., if not excepted" (per Hardwicke, L.C., in *Bagshaw v. Spencer* (1748), 2 Atk. at p. 578, 1 Ves. sen. 142, and see *Trodd v. Downs* (1742), 2 Atk. 304); but where the intent to give an estate of inheritance is clear, these additional words will be ignored in accordance with the maxim, "expressio eorum quæ tacite insunt nil operatur."

An equitable life tenant, unimpeachable, has a right to the proceeds of timber, cut under the order of the Court, as against the trustees of the estate who hold upon trust "out of the rents and profits" to pay off incumbrances. "Rents and profits" was construed in the ordinary sense of annual rents and profits. *Lovat v. Leeds*, No. 2 (1862), 2 Drew. & Sm. 75. In the converse case of *Plymouth v. Archer* (1782), 1 Bro. C. C. 159, a tenant, impeachable, was held not entitled to cut timber on the same ground. And in *Partridge v. Pawlet* (1736), 1 Atk. 467, Lord Hardwicke, L.C., held that "a devise of rents and profits of an estate to a husband for life, without impeachment of w., shall not be considered as annual profits only, but will empower him to cut timber."

Where estates are devised to a life tenant, unimpeachable, subject to a trust for sale for the payment of debts, the trustees should not sell timber for the payment of debts, and if they do, the life tenant will be entitled to a

charge to that amount on the estates. *Davies v. Wescomb* (1828), 2 Sim. 425. And see *Downshire v. Sandys*, p. 156.

In *Kekewich v. Marker* (1851), 3 Mac. & G. 311, real estates were settled so that the plaintiffs as trustees had a term of one thousand years for raising three several sums of £10,000, without impeachment of w., save only in cutting ornamental timber. The trustees were to raise the money by selling timber, or demising, mortgaging, or selling the premises or any part thereof (except the mansion house), and subject thereto the estates were settled by legal limitations (in effect) upon the defendant H. W. Marker for life, unimpeachable. He was also, as executor and legatee of the settlor, entitled to one of the sums of £10,000. Truro, L.C., after stating that the trusts were in an unusual form, said: "I think . . . that the intention of the grantor is perfectly clear and distinct; that in her judgment there was timber fit to be cut, and that she intended that the trustees should exercise their discretion in raising by means of the timber so much as it might be able to furnish towards the sums of money which are the objects of the settlement. . . . Both provisions may stand together, for if the trustees do not think fit to exercise their discretion to cut, the tenant for life may; or if they do cut all the timber, there will still be left a great deal for the exemption from w. to operate upon; the tenant for life may work mines, take stones, and make considerable profits, which are a part of the inheritance, and which he would not be able to do without the exemption. . . . Now the duty of the trustees is to throw the burden of the principal upon the inheritance, and the tenant for life is to keep down the interest; but if the tenant for life may cut down the timber which is a portion of the inheritance to the extent contended for in

this case, he gets relieved altogether from contributing to the charges in respect of that timber; and it appears to me hardly reasonable to suppose that it was intended that the tenant for life should have such a power. . . . No case was cited at the Bar, and I have been able to find none at all leading to the conclusion that this Court has ever controlled the execution of an express and clear trust."

Again, in *Briggs v. Oxford* (1852), 1 D. M. G. 363, wooded estates were vested in trustees, subject to a trust to raise a certain sum by mortgage, and then upon trust (in effect) for the Earl of Oxford for life, remainder to his eldest son, the defendant, for life, without impeachment of w., remainder to the latter's sons successively in tail male. A proviso gave power to the trustees, so long as there should be any incumbrance subsisting on the estates, with the consent of the second tenant for life, if the first were dead (which he was), to fell timber, &c., for the liquidation of the incumbrances. Knight Bruce and Lord Cranworth, L.J.J., held that the power of the trustees was paramount to that of the life tenant unimpeachable. "The question being, in substance, whether, according to the true intention of the settlement, the timber growing on the estate is during his lordship's life to be applicable to his own purposes, or to relieve the inheritance from certain charges, we think that the latter is plainly the true construction. It is not necessary to rely upon the obvious argument that the contention of Lord Oxford goes to strike the parenthesis (if it is a parenthesis) out of the settlement, or to give it no operation. Independently of that observation, not necessarily conclusive, the intent is plain that the trustees were to have the power of cutting timber for the purpose of relieving the inheritance, not to be exercised without his consent." It was also held

that the power was not bad as tending to a perpetuity, on the ground that it could be destroyed by the barring of the entail; distinguishing *Ferrand v. Wilson* (1845), 4 Hare 344, and *Ware v. Polhill* (1805), 11 Vesey 257.

A power to trustees to make leases to impeachable tenants is not inconsistent with an unimpeachable estate in the life tenant. *Lushington v. Boldero* (1815), Cooper 216.

Without Impeachment, "except."—A little confusion exists in construing cases in which an exception is made to a general licence to commit w., by the decision of *Garth v. Cotton* (1753), 1 W. & T. L. C. &c., where Lord Hardwicke held that a tenant for years without impeachment of w., "excepting voluntary w.," "had no present right to or interest in the timber, other than the mast and shade and necessary botes." This decision was criticised by Romilly, M.R., who said, in *Vincent v. Spicer* (*infra*), that no question was raised against the tenant for years, but against the remainderman, who collusively profited by the fall of timber, and that it does not clearly appear what the nature and extent of the fallen timber was. But considering the division by Lord Coke of all w. into voluntary and permissive, unless voluntary w. is considered in all cases of construction as the equivalent of equitable w., it is difficult to see why the tenant should not remain liable for all active w. under these words, including the cutting of such timber as an unimpeachable tenant could cut and an impeachable tenant could not. See *Kekewich v. Marker* (1851), 3 Mac. & G. 311, *supra*. In *Wickham v. W.* (1815), 19 Vesey 419, Cooper 288, Eldon, L.C., left the rights of a life tenant "without impeachment of w. other than wilful w.," to be determined in an action at law; but it appears that the interest on timber cut in such a case under the order of the Court, belongs to

the tenant in possession. To cut decaying timber, not ornamental, would not be "wilful w."

Then comes the decision in *Vincent v. Spicer* (1856), 22 Beav. 380, where the settlor conveyed his own estates to trustees for the use of himself for life "without impeachment of or for any manner of w., save and except spoil or destruction, or voluntary or permissive w., or suffering houses or buildings to go to decay, and in not repairing the same." Romilly, M.R., held that the deed was to be construed as if a stranger had been grantor, and therefore most favourably to the life tenant (though it is difficult to see how this rule could affect the decision, as there was no question between grantor and grantee, but between tenant for life and remainderman, both parties being grantees). He also held, in order to give general effect to all the words quoted above, that the life tenant might cut timber, other than ornamental, as if he were an owner in fee simple, having a due regard to his own interest and the permanent advantage of his estate.

In *Higginbotham v. Hawkins* (1872), 7 Ch. 676, a life tenant was held to have committed a breach of the exception by which she was prevented from cutting down any timber other than such timber as might be required for the repairing of the buildings.

In *Downshire v. Sandys* (1801), 6 Vesey 107 at p. 115, Eldon, L.C., held that the powers of the life tenant, unimpeachable, could not be enlarged by implication from larger powers given to trustees after her death, and as to the execution of such powers by trustees of a term to raise certain sums of money, he said: "It is not to be denied, that the terms 'without impeachment of w.' as applied to trustees of a term for special purposes, have a very different sense from that of the same words annexed to a

tenancy for life ; and in the ordinary case I do not apprehend the Court would have permitted the trustees to execute their trust by cutting timber merely because they were trustees without impeachment of w., though they might at law. This Court would say, that having a discretion they must act in their trust as the Court itself would act. There is no pretence, therefore, to say that limitation would in the ordinary case enable them to cut timber, much less that species of timber which a tenant for life unquestionably might have cut." Nor should trustees with larger powers cut ornamental timber, when there is other to be cut.

In *Newdigate v. N.* (1826), 1 Sim. 131 ; (1834), 2 Cl. & Fin. 601, a tenant for life unimpeachable "except the timber growing in the park avenues, demesne lands, and woods adjoining" the capital messuage, was restrained from cutting woods, &c., ornamental and for shelter to the house, there being no timber accurately answering the description in the will. And in *Marker v. M.* (1851), 9 Hare 1, a special inquiry was directed by Turner, V.C., as to the operation of a declaration in a settlement, that enough of the most ornamental timber should always remain to preserve the beauty of the place unimpaired.

Lowndes v. Norton (1864), 33 L. J. Ch. 583, was a case in which a codicil giving land to trustees for a daughter, without impeachment of w., was held entirely revoked by a subsequent deed giving the same lands to a trustee for the daughter, but without making her dispunishable.

Assignment.—In *Gordon v. Woodford* (1859), 27 Beav. 603, a life tenant, dispunishable, had sold to the trustees of the settlement under which he held, "all and singular the timber and timberlike trees then growing and being and which should thereafter grow and be, &c." Under this assignment it was held that the trustees were

entitled to the thinnings of such trees, and an injunction was granted, limited to cutting "timber and timberlike trees," as to which term Romilly, M.R., said: "It includes all wood which is considered timber everywhere, as oak, ash, and elm. It also includes all that species of wood which is timber by the custom of the county in which the estate is situated." And cf. *Smythe v. S.* (1818), 2 Swans. 251, from which it appears that timberlike trees are trees which are in the way to become timber. As to thinnings, see p. 84.

Mowing Park.—In 1847, Knight Bruce, V.C., enforced against a dispunishable life tenant a provision in the will of 1787, under which he held, that no person should mow any part of the park, p. 259. *Blagrove v. B.* (1847), 1 De G. & S. 252.

Perpetual Tenants.—By 23 & 24 Vict. c. 154, s. 25 (Ireland, 1860), certain tenants with perpetual interests were made unimpeachable, except for fraudulent or malicious w. (See p. 274.)

TENANT IN TAIL.

It is necessary to say but little about this tenant, for he has ever been recognised as being unimpeachable both at law and in Equity, liable neither for voluntary, permissive nor equitable w. And see *Wyld v. Lewis* (1738), 1 Atk. 432, where a bill was dismissed; 8 Bacon 392.

A bond, not to commit w., given to the settlor by the tenant in tail is void. *Jervis v. Bruton* (1691), 2 Vern. 251; 1 Eq. Ca. 37. Nor is a power to cut, given to trustees, good as against such a tenant. *Ferrand v. Wilson* (1843), 4 Hare, p. 374; *Briggs v. Oxford* (1852), 1 D. M. G. 363. Cf. *Ware v. Polhill* (1805), 11 Vesey 257.

In *Colson's Trusts* (1853), Kay 133, a fund was directed to be invested for a term and the income applied

in repairs, in order to prevent timber being cut during the continuance of the investment, at the end of which term the capital was to be paid to the descendant of the first life tenant in actual possession. By disentailing deeds the restriction on cutting timber was abrogated, and Page Wood, V.C., held that the repairing fund was immediately payable to the tenant in possession.

A contract for sale of timber by a tenant in tail, not followed by severance during his life, is invalid against the remainderman, and the purchaser cannot fell and remove the unsevered trees. *Liford's Case* (1615), 11 Coke 46 b; *Roberts v. R.* (1657), Hardre 96. See the Settled Land Acts. Cf. *Re Llewellyn* (1887), 37 Ch. D. 317.

In *Mallet v. M.* (1611), 2 Brownl. 133, a grant to two men and the heirs of their two bodies, on the death of one of them without heirs, left the other tenant for life of that half, and in respect of that liable for w. at the suit of the reversioner.

"If the tenant in tail grant all his estate the grantee is punishable of w." *Anon.* (1585), 3 Leonard 121; 8 Bacon 392.

"A quasi tenant in tail *pur autre vie* in possession has complete power over the estate to bar the entail and the remainders over, by an act *inter vivos*, dealing with the estate precisely as if there had never been any settlement." Tudor, L. C. 54.

As to infant tenants in tail, see "Infants."

TENANT IN TAIL AFTER POSSIBILITY OF ISSUE EXTINGUISHED.

This tenant was one of those against whom the old action of w. did not lie, and this apparently because of the greatness of the estate which was once in him, and perhaps also because there was no such estate known to

our law at the time of the passing of the Statute of Marlbridge, Broke 43, 60; 2 Rolle Abr. 826, 828. But this state of the law was to some extent remedied by the Court of Chancery, which under Nottingham, L.C., began to grant injunctions to prevent equitable w., and to treat tenants in tail after possibility as tenants for life without impeachment of w. Not only in their liabilities, but in their rights are these tenants alike, for "as tenant without impeachment of w. can fell and sell at his pleasure, so can tenant after possibility, and it is all one," *Bowles v. Berrie* (1616), 1 Rolle R. at p. 182; S.C. *Lewis Bowles' Case*, 11 Co. 79 b, where it was decided that each of these classes of tenants has a right of property in the materials of a house thrown down by a tempest, and a right to fell trees, which upon severance, whether by tempest or their own act, become their property (e). "It was observed, that tenants in special tail at Common Law had a limited fee simple, and when this estate was changed by the statute 'De donis conditionalibus,' yet there was not any change of their interest in doing of w.; so when by the death of one donee without issue the estate is changed, yet the power to commit w., and to convert it to his own use, is not altered nor changed for the inheritance which was once in him." *Platt v. Powles* (1813), 2 M. & S. 65, is a case of cutting timber by a tenant in tail after possibility and by her second husband. It was held justifiable. The suggestion to the contrary in *Herlakenden's Case*, 4 Co. 63 a, is not law.

Several Chattels.—The law that a tenant after possibility has the property in timber severed, was finally settled by *Williams v. W.* (1808), 15 Vesey 419; and on an issue at law (1810), 12 East 209, where the Judges

(e) See *A. G. v. Marlborough* (1818), 3 Madd. at p. 538.

also certified that an estate limited to the defendant as tenant for life, remainder to trustees to preserve, &c., remainder to defendant as tenant in tail after possibility, was in the defendant in the latter character only in spite of the remainder to trustees.

Assignee.—A doubt was expressed in *Owen's* or *Ewen's Case*, cited 1 Roll. R. 179, whether the assignee of the estate of a tenant after possibility is unimpeachable, but this was not decided. See Co. Lit. 28 a, and *supra*, p. 159. In 2 Inst. 302 Lord Coke says that the assignee shall be punished. See *infra*, p. 221.

EXECUTORY TRUSTS.

The Court in construing the directions of a settlor in regard to executory trusts endeavours to ascertain his intentions as expressed in the will or settlement, using the expressions as instructions from which to draw the complete document. It is entirely a question of intention whether life estates should be made dishonourable of w.

The earliest case on the subject is *Leonard v. Sussex* (1705), 2 Vern. 526, Eq. Ca. Abr. 12, 184, where there was a devise to trustees upon trust to settle a moiety of the property upon each of two sons and the heirs of their respective bodies, taking care that it should not be in their power to dock the respective entails. Here it was held that they should have estates for life without impeachment of w. on the ground of intention, for had the estates been legal, they would have had estates tail.

Then in *Woolmore v. Burrows* (1827), 1 Sim. 512, there was a bequest to trustees upon trust to lay out in land "to be added and closely entailed to the family

estate now in the possession of T.B.," who had a tenancy for life without impeachment. The new estates were directed to be settled so as to give T. B. an equitable estate for life unimpeachable, per Hart, V.C.

In *Bunkes v. Le Despencer* (1843), 11 Sim. 508, where there was a grant to trustees upon trust to strictly settle the estates so that they should go along with a barony in fee, estates were given without impeachment, per Shadwell, V.C. This case was followed in *West v. Holmesdale* (1870), 4 H. L. 543, although the word "entail" was used in the directions, Lord Cairns saying this was a matter, under the very wide words of the codicil, within the discretion of the trustees or of the Court, and that the fact that in the revoked will the estates were given to life tenants unimpeachable, ought not to be disregarded.

In *White v. Briggs* (1848), 2 Phil. 583, a testator gave an estate for life to his widow, and then the absolute interest to a nephew, following this with a direction that the property should be settled for the benefit of those who should be thereafter interested. The Master approved of a draft deed giving successive life interests, without impeachment, to the widow and nephew, and this part of the draft was not objected to.

All the decisions prior in date were considered by Page Wood, V.C., in *Davenport v. D.* (1863), 1 H. & M. 775, where he said: "All these authorities have this common quality, viz., that words importing a larger estate are cut down to an estate for life without impeachment of w.; but no case has been cited where an estate for life has had any addition made to it by the manner in which the Court has executed an executory trust." He therefore declined to allow an unimpeachable estate to be given.

The testator had given all his residuary real and personal estate to the defendant upon trust to settle the Foxley estate, a large portion of which consisted of timber, to the use of the defendant for life with remainders in tail, with all usual and proper provisions and all such other powers and provisions as counsel should advise. It was directed in the order that "proper powers should be inserted enabling the trustees to cut timber in due course of management for the benefit of all persons interested in the estate." This was followed by Malins, V.C., in *Stanley v. Coulthurst* (1870), 10 Eq. 259, where was a bequest of personal estate to trustees for the purchase of land to be settled "in strict settlement" upon the trusts set out of the personal estate. The devise of another estate was referred to as showing what the testator meant.

Clive v. C. (1872), 7 Ch. 433, is the only other case. Here there was an executory trust for a settlement to be made on the marriage of a daughter under twenty-one, so as to give her a life estate without power of anticipation, and a subsequent life estate to her husband "either with or without impeachment of w." The L.J.J. held that the restraint upon anticipation is inconsistent with a power to commit w., but that "there was no inconsistency in giving such a power to the husband. The trustees might fairly have a discretion in the matter, in order that they might make the best terms they could with the husband, and this discretion they have exercised."

For an order rectifying a settlement as not made in conformity with marriage articles, in respect of upholding and maintaining the estate by a deceased tenant for life, see *Langley v. Furlong* (1758), Dick. 315.

As to a precatory trust, see *Wright v. Atkyns* (1823), Turn. & R. at p. 157.

EXECUTORY DEVISE OVER.

It is now settled by *Turner v. Wright* (1860), 2 De G. F. & J. 234, a decision of Campbell, L.C., affirming the judgment of Page Wood, V.C., in *Johnson* 740, that a tenant in fee simple, subject to an executory devise over, is in the same position as a tenant after possibility, i.e., that he is dispunishable of legal, but impeachable of equitable w. ; dissenting from the opinion of Eldon, L.C., in *Stansfield v. Habergham* (1804), 10 Vesey 273, and explaining *Robinson v. Litton* (1744), 3 Atk. 209, as being there wrongly reported, but correctly stated in 6 Cruise 428, which agrees with 8 Viner 475 & 2 Eq. Ca. Abr. 528, from all of which it appears that the defendant was only entitled to the rents and profits of the estates until attaining twenty-one, and that from thenceforward he was to hold as trustee for sale for the purpose of increasing his sisters' fortunes. The will was obscurely drawn.

Chattels severed under Order of Court.—In *Dyer v. D.* (1865), 34 Beav. 504, Romilly, M.R., held that timber cut under the order of the Court during the minority of the tenant is personalty, and on his death, when the gift over of the estates took effect, descended to his legal personal representative. It was clear on the authority of *Turner v. Wright*, that the infant was entitled to the proceeds, and the only question was as to their real or personal nature. The interest of the infant would have justified a much more extensive inquiry and cutting than was actually ordered, the inquiry being limited to decaying, deteriorating, and prejudicial trees, proper to be cut in the interest of all parties.

In *Claxton v. C.* (1690), 2 Vern. 152, a devisee in fee, subject to an existing life interest and to a gift over

on failure to pay certain legacies, was allowed by the Lords Commissioners to cut timber for the payment of the legacies, making compensation to the life tenant for "damage done to the ground, w., &c." See "Cutting under the Order of the Court," p. 201.

In *Blake v. Peters* (1863), 1 De G. J. & S. 345, Knight Bruce & Turner, L.J.J., upheld a restriction against cutting timber imposed by the wills under which the defeasible tenant held, and declared his estate liable to refund the proceeds with interest *from his death*. A clause of forfeiture had not been enforced. Though not liable to repair, such a tenant is responsible for the value of the materials of ruined buildings. He is also liable for the fines on renewals of leaseholds and copyholds.

EQUITABLE WASTE.

WE have seen that it was finally decided by *Lewis Bowles' Case* (1616), 11 Coke 79 *b*, that a tenant without impeachment of w. was not only free from the penalties imposed by the Statutes of Marlbridge and Gloucester, but had such an interest in the estate as to be able to w. and apply the w. or its proceeds to his own use, to the same extent as a tenant in tail. (*Supra*, p. 145.) To prevent an unconscientious use of this power, the Court of Chancery began (*a*) to intervene under Nottingham, L.C., and to grant injunctions to restrain any tenant, in the position of a life tenant without impeachment, from committing what is now known as equitable or voluntary w. (*b*). Thus in (*c*) *Abraham v. Bubb* (1680), 2 Freeman 53, 2 Show. 69, 2 Eq. Ca. Abr. 757, a widow, who was tenant in tail after possibility of issue extinct, and therefore for the present purpose in the position of a life tenant unimpeachable (see p. 159), married the defendant Bubb, "and she and her second husband having felled some trees in a grove that grew near, and was an ornament to the mansion house, and having an intent to fell the rest," the

(*a*) See, however, an earlier case, somewhat in point, *Sir George Stripping's*, p. 11.

(*b*) The legal power to commit equitable w. by a tenant for life was

abolished by Jud. Act, 1873, s. 25, sub-s. 3. As to the effect of this, see p. 198.

(*c*) Sometimes printed *Abrahall*.

defendant was sued by the reversioner for an injunction. The L.C. said : " If there be tenant for life without impeachment of w., if he goeth to pull down houses, &c., to do w. maliciously, this Court will restrain, although he hath express power by the act of the party to commit w.; for this Court will moderate the exercise of that power, and will restrain extravagant humorous w., because it is *pro bono publico* to restrain it. . . ." Again in *Williams v. Day* (1680), 2 Ch. Ca. 32, he " declared that he would stop pulling down houses or defacing a seat by tenant after possibility of issue extinct, or by tenant for life, who was punishable of w. by express grant or by trust." *Cooke v. Whaley* (1701), 1 Eq. Ca. Abr. 400; *Anon.* (1704), 2 Freeman 278, 2 Eq. Ca. Abr. 757.

In *London (Bp. of) v. Web* (1718), 1 P. Wms. 527, a tenant was restrained from digging brick-earth, but not from carrying away what he had already dug. Qu.

House.—*Vane v. Barnard* (1716), 2 Vern. 738, Prec. Ch. 454, is the leading case always referred to on the subject of destruction in houses. There the defendant, being the first tenant for life, unimpeachable, under a settlement made by him on the marriage of the plaintiff his eldest son, " having taken some displeasure against his son, got 200 workmen together, and of a sudden, in a few days, stript (Raby Castle) of the lead, iron, glass doors, and boards, &c., to the value of £3,000. The Court . . . upon the hearing of the cause, decreed not only the (interim) injunction to continue, but that the castle should be repaired, and put into the same condition it was in."

But this will not be extended to small matters, *e.g.*, removing a deal floor. *Piers v. P.* (1750), 1 Ves. sen. 521.

In *Rolt v. Somerville* (1737), 2 Eq. Ca. Abr. 759, Hardwicke, L.C., decreed reinstatement by the defendant who, being the husband of a life tenant, unimpeachable, had pulled down houses and outbuildings and sold the materials, and had taken up lead pipes carrying water to the mansion house. As no reinstatement could be decreed as to ornamental timber felled there was no satisfaction given as to this in either case; but it will be seen later that the Court of Chancery assumed jurisdiction to give an account where a wrongful act had issued in profit to the wrong-doer, and by Lord Cairns' Act, 21 & 22 Vict. c. 27, s. 2, jurisdiction to decree damages was extended to all cases in which the Court has jurisdiction to grant an injunction or specific performance. Although this section was repealed by 46 & 47 Vict. c. 49, s. 3, the jurisdiction was preserved by s. 5, *Sayers v. Collyer* (1884), 28 Ch. D. 103; and under the Judicature Act, 1873, the Court has independent powers, *ib.* p. 108, *Elmore v. Pirrie* (1887), 57 L. T. 333.

Where defendant had pulled down intending to rebuild, as permitted by the settlement, see *Micklethwait v. M.*, *infra*, p. 184; (1857), 1 De G. & J. 504.

Rebuilding.—In *Morris v. M.* (1858), 3 De G. & J. 323, a mansion house had been pulled down by the tenant for life thirty years before action brought, but there was no evidence that he had sold any of the materials, and there was evidence that he had used all of any value in rebuilding on another eligible part of the estate. The only advantage he had derived from the pulling down was in enjoying the old materials in their new position, and the Court of Appeal, Knight Bruce and Turner, L.J.J., held that this was not enough to ground an account, though it would have been otherwise if the materials had

been sold. Stuart, V.C., had dismissed the action on the Statute of Limitations; see 4 Jur. N. S. 964; 6 W. R. 427, but this ground was not argued in the Court above.

Liberty to a tenant to build and a proviso that he should repair and maintain present and future erections does not preclude him from pulling down and rebuilding, in the absence of a negative covenant. *In re McIntosh & The Pontypridd, &c., Co.* (1891), 61 L. J. Q. B. 164, Div. Ct., following *Doherty v. Allman* (1878), 3 A. C. 709. And see "Meliorating W.," p. 139.

In *Leeds v. Amherst* (1846), 2 Ph. 117, Cottenham, L.C., dismissed an appeal by the representatives of the life tenant, who had pulled down a mansion house, which appeal was founded on lapse of time and acquiescence. The decree was limited to the amount of the benefit received, with interest at £4 per cent. from his death. And in *Bridge v. Brown* (1843), 2 Y. & C. C. C. 181, Knight Bruce, V.C., disallowed the claim of trustees for the unnecessary expense of pulling down a farmhouse and rebuilding it.

In *Huntley v. Russell* (1849), 13 Q. B. 572, Parke, B., directed the jury that if they were satisfied that a certain cottage, lean-to, and barn were not affixed to the freehold, the tenant (vicar) was not liable for pulling them down. Jury found they were not affixed to the freehold, though one was built on stone posts which had sunk into the ground. This direction was upheld in the Court of Error. As to pulling down farmhouses, &c., see p. 181.

A house on fire may be pulled down if necessary to prevent the fire spreading. *Maleverer v. Spinke* (1538), Dyer 37 a.

Trees. General Grounds of Interference.—The grounds upon which the Court interferes are well stated by Turner,

when V.C., in *Marker v. M.* (1851), 9 Hare at p. 17, as follows: "The Court considers the excessive use of the legal power incident to an estate unimpeachable of w. to be inequitable and unjust, and therefore controls it;" and again in *Micklethwait v. M.* (1857), 1 De G. & J. at p. 524, when L.J.: "At law a tenant for life without impeachment of w. has the absolute power and dominion over the timber upon the estate, but this Court controls him in the exercise of that power, and it does so, as I apprehend, upon this ground, that it will not permit an unconscientious use to be made of a legal power. It regards such an unconscientious use of the legal power as an abuse, and not as a use of it. When, therefore, the Court is called upon to interfere in cases of this description, it is bound, I think, in the first place, to consider whether there are any special circumstances to affect the conscience of the tenant for life, for in the absence of special circumstances it cannot be unconscientious in him to avail himself of the power which the testator has vested in him. We have then to consider what are the special circumstances which the Court will regard as affecting the conscience of the tenant for life, and I apprehend that what is principally to be regarded is the intention of the settlor or devisor. If by his disposition or by his acts he has indicated an intention that there should be a continuous enjoyment in succession of that which he has himself enjoyed, in the state in which he has himself enjoyed it, it must surely be against conscience that a tenant for life, claiming under his disposition, should, by the exercise of a legal power, defeat that intention. We have here, I think, the clue by which the difficulty of this case can be solved. If a devisor or settlor occupies a mansion house, with trees planted or left standing for

ornament around or about it, or keeps such a mansion house in a state for occupation, and devises or settles it so as to go in a course of succession, he may reasonably be presumed to anticipate that those who are to succeed him will occupy the mansion house; and it cannot be presumed that he meant it to be denuded of that ornament which he has himself enjoyed."

House and Timber.—So in *Leeds v. Amherst* (1846), 2 Phil. 117, Cottenham, L.C., said: "An old family house was demolished, and a quantity of timber in the park, admitted, to a certain extent at least, to have been ornamental timber, was cut down. Whether that was a judicious arrangement for the family, it is quite immaterial to inquire, for a tenant for life has no right, whatever may be his opinion upon that point, to alter the nature of the property belonging to another person; and therefore even admitting all that is alleged by the defendants as to that, the owner of the estate is entitled to be reimbursed the proceeds of that equitable w."

No House, Timber not Protected.—It will be observed that in every case there has been a mansion house to which the protected woods have been treated as ornamental. Where there is no mansion, there will be no protection to the trees. Cf. *Newdigate v. N.* (1834), 2 Cl. & Fin. 601. See *infra*, p. 184.

Injury to House by Cutting Trees.—If any injury by tempest result to the house by reason of the cutting of the sheltering trees, the tenant who cuts them will be liable in damages. *Sticklehorne v. Hatchman* (1586), Ow. 43.

Trees.—The earliest case on equitable w. in trees was L.C. Nottingham's decision in *Abraham v. Bubb*, u.s. (p. 166), where he cited "the *Bishop of Winchester's Case* (not reported), who made a lease for twenty-one years,

without impeachment of w., of lands that had many trees upon it; the tenant cuts down none of the trees till about half a year before the expiration of his term, and then goeth to felling down the trees, and in that case he was enjoined by this Court; for though he might have felled trees every year from the beginning of his term, and then they would have been growing up again gradually, yet it is unreasonable that he should let them grow till towards the end of his term, and then sweep them all away; for though he had a power to commit w., yet this Court will model the exercise of that power." (d)

This decision was given, as Lord Nottingham said in *Skelton v. S.* (1677), 2 Swans. 170, "by the advice of all the Judges *pro bono publico* and in favour of the church, whereof the King is patron, notwithstanding the agreement of the parties," and is not therefore to be generally followed.

The next case is *Anon.* (1704), 2 Eq. Ca. Abr. 757, 2 Freeman 278, where a woman, tenant in tail after possibility of issue extinct, and therefore in the position of a tenant for life, unimpeachable, "was restrained from committing w. in pulling down houses, or in cutting down trees which stood in defence of the house, and fruit trees in the garden, but not for some turrets of trees which stood a land's length or two from the house." Cf. *Lawley v. L.* (1717), Jacob 71 n., a very early case on equitable w.

In *Rolt v. Somerville* (1737), 2 Eq. Ca. Abr. 759, an account was refused in a suit by the next life tenant, who was also unimpeachable, though nowadays it would probably be granted, and Lord Hardwicke said that "in

(d) *Udall v. U.* quoted in this case was quite immaterial, see *Williams v. W.* (1810), 12 East, at p. 215 n.

Sir Blundel Charlton's Case the M.R. decreed that no trees should be cut down that were for the ornament of the park; but King, L.C., reversed that, and extended it only to trees that were planted in rows; or as he states in *Packington's Case* (1744), 3 Atk. 215, "King, L.C., continued the injunction as to trees for ornament or shelter, but dissolved it as to straggling trees." And Hardwicke, L.C., further said: "Whether trees grow natural, or were planted, if they serve as an ornament or shelter it amounts to the same thing; and it is very probable the situation of the house was chosen for the sake of cutting ridings and vistas through the woods. . . . I will restrain the defendant, therefore, from cutting down trees in lines or avenues or ridings in the park; and likewise from cutting down trees that are not of a proper growth to be cut." The injunction was afterwards continued on the ground of previous threats, though they were subsequently disclaimed and but three trees had been cut, *Packington v. P.* (1745), Dick. 101.

All Trees are Protected.—It may be mentioned here that the protection of the Court extends, not only to timber and timberlike trees, but also to all trees, and that the words "timber or other trees" are always inserted in the inquiry and injunction. *Obrien v. O.* (1751), Ambler 107; *Chamberlyne v. Dummer* (1782), 1 Bro. C. C. 166; *Tamworth v. Ferrers* (1801), 6 Vesey 419, &c.

Protected as Ornamental.—The control, however, which the Court exercises over the legal power, it exercises "with reference to the presumed will and intention of the party by whom the power was created, and not to any fancied notions of its own, and therefore, as to ornamental timber, confines its protection to timber planted or left standing for ornament," per Turner, V.C., in *Marker*

v. *M.* (1851), 9 Hare, at p. 17. Eldon, L.C., had previously said in *Downshire v. Sandys* (1801), 6 Vesey, at p. 110: "The principle upon which the Court has gone seems to be that, if the testator or the author of the interest by deed had gratified his own taste by planting for ornament, though he had adopted the species the most disgusting to the tenant for life, and the most agreeable to the tenant in tail, and upon the competition between those parties the Court should see that the tenant for life was right, and the other wrong, in point of taste, yet the taste of the testator, like his will, binds them; and it is not competent to them to substitute another species of ornament for that which the testator designed. The question, which is the most fit method of clothing an estate with timber for the purpose of ornament, cannot be safely trusted to the Court. The principle has been extended from ornament of the house to out-houses and grounds, then to plantations, vistas, avenues, to all the rides about the estate for ten miles round. If that principle has been rightly applied, it is very difficult in argument to say it cannot be applied to a common as well as in field lands, and that the contiguity or remoteness, if *de facto* it was planted for ornament, can alter the principle upon which the rule of the Court is to be applied." (e)

In *Wombwell v. Belasyse* (1825), 6 Vesey 110 a, note (2nd edition), L.C. Eldon said: "The question is not whether the timber is or is not ornamental, but the fact to be determined is, that it was planted for ornament, or, if not originally planted for ornament, was, as we express it, left standing for ornament by some person having the absolute

(e) This principle will not be strictly applied where lands, as in *A. G. v. Marlborough* (1818), 3 Madd. 498, are settled by Act of Parliament in perpetuity. "The Court will distinguish between improvement and destruction," p. 549. See p. 185.

power of disposition. If such a proprietor had even the bad taste to plant or leave standing a couple of yew trees cut in the shape of peacocks on the roadside, I do not shrink from what I laid down in *The Marquis of Downshire v. Lady Sandys*, that they must be protected until some person, having the same absolute power of disposition, with more correct taste, comes into possession; and this doctrine applies in the same manner to a pleasant ride, although at the distance of two miles from the mansion house." His Lordship also held that if, after cutting rides through a wood, the absolute owner had continued to cut the wood for repairs and sale, it could not be said that the whole wood was dedicated to the purposes of ornament. Security for damages must be given upon an injunction and inquiry being ordered.

Although the trees which are here treated of are called "ornamental," both in numerous cases and in this place, it must be clearly understood that this word is only used for shortness, and that only those trees are protected as ornamental which are planted or left growing for ornament by an owner of the inheritance, whose taste governs those beneficiaries who claim under his disposition. Therefore an affidavit which states that trees "afford ornament" will not support an injunction, *Downshire v. Sandys* (1801), 6 Vesey 107; and an injunction will not be granted to protect trees which "contribute to ornament," *Williams v. McNamara* (1802), 8 Vesey 70; nor trees which are described as ornamental merely, and not as planted or left growing for ornament, *Burges v. Lamb* (1809), 16 Vesey, p. 183; *Coffin v. C.* (1821), Jacob 70. In *Bedoyère v. Nugent* (1890), 25 L. R. Ir. 143, Porter, M.R., held that it was not necessary that the trees should be planted exclusively for ornament,

while Wood, V.C., had said in *Halliwell v. Phillips* (1858), 4 Jur. N. S. 607, that they must be planted "not at all for purposes of profit"—a dictum which cannot be supported, for in *Ford v. Tynte* (1864), 2 De G. J. & S. 127, following *Wombwell v. Belasyse*, the woods were held to be dedicated, subject to their being resorted to for repairs, and the inquiry was framed accordingly, see p. 191. "Even if an owner in fee cut timber for thinning, or even for profit, it does not necessarily follow that he intended what he did not cut, but left standing, to be cleared off by his successors." *Bedoyère v. Nugent*, at p. 154. In *Ashby v. Hincks* (1888), 58 L. T. 557, Stirling, J., held, on an application for an interlocutory injunction, that where property was purchased under a power of exchange, the timber then standing for ornament or shelter could not be cut. It must be remembered that no general rule can be laid down as to what evidence is sufficient, for, provided there be some evidence, every Judge, like every jury, must form his own conclusions as to its efficacy. Leach, V.C., said in *Lushington v. Boldero* (1819), 6 Madd. 149: "The leaving trees standing beyond the usual and provident period of cutting, the clearing out of trees and surrounding them by pleasure walks and seats, and other circumstances from which an inference arose that the testator regarded the trees with other views than as mere subjects of profit, were to be considered as *prima facie* evidence that trees were left standing for ornament and shelter, and more especially when actually connected with those objects from their situation."

Again, in *Marker v. M.* (1851), 9 Hare 1, an injunction was sought as to 500 oaks standing in woods of about thirty-three acres in extent, forming a belt or boundary to the pleasure grounds, and visible from the

house. Eleven other oaks were standing above a small orchard adjoining the lawn, and likewise visible. Five more were not so visible, and the position of 189 did not appear. It was declared by the settlement that enough of the most ornamental timber should always remain to preserve the beauty of the place unimpaired. Turner, V.C., said at p. 21 : " I think that no case whatever is made out as to the 200 oaks not being in the woods. There is nothing whatever to show that any of them were planted or left standing for ornament or shelter, nor is there any evidence that any of them are in fact ornamental *within the provisions of the deed*, except as to the eleven oaks above the orchard and the five on the road from the vicarage ; and, as to these, I think the case fails. I am of opinion, therefore, that, as to these 200 trees, the injunction ought to be refused.

" With respect to the 500 oaks in the woods, however, I think the case widely different. These woods are in immediate proximity to the mansion house. The settlor, in the deed, refers to timber ornamental to the mansion house and pleasure grounds, and the views and prospects of the same ; and there does not appear to be any evidence of there being any timber upon the estate which could fall within that description other than the timber in these woods. The settlor, too, lived for nearly two years after the execution of the settlement, and never cut any timber in these woods, although it is clear that they were crowded with timber ; and here the estate was unimpeachable of w., except as to ornamental timber. These considerations far outweigh, in my mind, the evidence on the part of the defendant Henry William Marker. I cannot place much reliance on such of the affidavits on his part as state simply the fact that the

woods were not planted or left standing for ornament or shelter, without assigning any reason for that conclusion, or much more reliance on such of the affidavits on his part as ground the conclusion on the existence of stools or stumps, without information as to the circumstances under which those trees were cut down. Nor can I rely on the acts of the tenants for life whose estates were impeachable of w., or on the statement that the settlor intended to cut down timber in those woods, no such act having been done by her, and the statement having been made after the execution of the deed by which the property had become bound by the trust. I should have felt it right, therefore, to interfere as to these 500 oaks, even if the question had rested simply upon the point whether they were left standing for shelter or ornament; but, beyond this, I think it clear upon the evidence that they are in fact ornamental within the meaning of the deed, and I am perfectly satisfied upon the evidence that they cannot be cut down without impairing the beauty of the place."

There remain two cases, in both of which the trees were growing on land separated from that, on which the mansion house was built, by land of strangers. In *Downshire v. Sandys* (1801), 6 Vesey 107, fir trees were growing on a common not less than two miles from the house. Eldon, L.C., said: "If the in-field lands and plantations are protected, is it not fit also to protect that which is scattered round, and is really part of the same plan of improvement? It is impossible that a principle for general application can depend upon the circumstance, whether a little slip of land connects the estate with the common, or is interposed between them; or whether the common is in sight.

Suppose it is situated on a different side of a hill from the house; if the system of plantation for the ornament of the estate embraced the whole circuit of the hill, will it be said that it is not to be protected, because it is on the other side of the hill? So, if it is at a distance of two miles, it is a very material circumstance upon the question of fact, whether it was planted for ornament or not; but, if it could be seen from the grounds, or if it was the ride of the family for pleasure, that is evidence that it was planted for ornament, and the distance is only a circumstance of fact, material as evidence to decide the fact, whether the trees are growing for ornament or not."

In *Halliwell v. Phillips* (1858), 4 Jur. N. S. 607, Wood, V.C., held that the onus of proof was on the plaintiff who impeached the cutting, that the mere purchase of adjoining lands with woods did not make those woods ornamental to the house, that there must be some further act of dedication, such as cutting drives, planting clumps or erecting statues, &c. He refused to interfere with the cutting of hedgerow timber, not proved to be planted or left growing for ornament, and as to an alleged drive, he said: "Although called also a drive, neither is it a drive in the ordinary sense of the term, *i.e.*, it is not used as an approach to or from the house, it is only a foot and bridle way, and though not inaccessible to carriages, is very difficult, and is more like a farm road than an access to a gentleman's house; and it is proved that in the lifetime of the testator it was closed with an ordinary five-barred gate, like any other copse, and that the testator himself did not keep a carriage." The V.C. seems to have forgotten that trees ornamental to walks are protected as well as those

ornamental to drives, and that whether a road or path is kept in very good order or not is not very material to the issue.

As to an extensive wood, Eldon, L.C., said in *Burges v. Lamb* (1809), 16 Vesey, at p. 183: "The question upon the principle as to ornamental timber, in the extent to which it has been pushed in this argument, appears to be new; that by building a house near a wood the wood is devoted to the protection of that principle of Equity; and so, the effect of making walks through a wood is that no part of the wood is to come down. The Court has not gone further than protecting what is planted or growing for ornament; and has frequently refused to act upon affidavits, stating merely that the timber is ornamental. Upon this subject I have anxiously guarded my expression against the inference that all the trees, which are ornamental, were within the principle. In the instance of a park, once full of wood, if timber had been felled, leaving vistas and rows and some scattered trees, it would be difficult to say the Court would protect the former and not the latter." As to this latter point see *Wellesley v. W.*, *infra*, p. 184.

In *Peters v. Blake* (1837), 6 L. J. Ch. 157, trees "in a rookery" were specially protected by the terms of the reference.

Trees excluding Bad View, Shade, &c.—In *Day v. Merry* (1810), 16 Vesey 375, Grant, M.R., issued an injunction to protect trees planted for the purpose of excluding objects from view; and in *Strathmore v. Bowes* (1786), 2 Bro. C. C. 88, an interim injunction included "timber that was of shade to the house," but the word "shade" was deliberately omitted from the injunction in *Downshire v. Sandys* (1801), 6 Vesey, at p. 108. The Court grants

injunctions when w. is threatened or only done in a slight degree, but the commission of one kind of w. does not justify an injunction extending to other kinds: *Coffin v. C.* (1821), Jacob 70, where Eldon, L.C., also said that Lord Hardwicke had restrained a man from cutting down trees which he had planted himself.

Immature Trees.—In *Aston v. A.* (1749), 1 Vesey 264, Lord Hardwicke said: “If tenant for life without impeachment of w. pulled down farmhouses, in general I should no more scruple restraining him, than I should from pulling down the mansion house (unless where he pulled down two to make into one in order to bear the burden but of one), it tending equally to the destruction of the thing settled. If therefore he should grub up a wood settled, so as to destroy the wood absolutely, I should restrain him. . . .” The L.C. proceeded to say that the cutting down of immature trees did not come within the doctrine of equitable w.; but this statement of the right of a tenant, unimpeachable, is much larger than would be recognised at the present day, as it is very evident that the tenant may not cut timber-like trees, unless they have become timber, though on the other hand he may cut those that have become timber, even though they are still thriving and would increase in size.

Proper Management.—In *Chamberlyne v. Dummer* (1792), 3 Bro. C. C. 549, where the defendant was tenant for life with express power to cut timber at all seasonable times in the year, an issue was directed by Loughborough, L.C., to try whether the defendant “had cut any saplings or young trees down which are not proper to be felled as timber, &c.” So *Castlemain v. Craven* (1733), 2 Eq. Ca.

Abr. 758; 22 Viner, Abr. 528; *Obrien v. O.* (1750), Amb. 107; *Strathmore v. Bowes* (1786), 2 Bro. C. C. 88; 2 Dick. 673; 1 Cox 263; and in *Tamworth v. Ferrers* (1801), 6 Vesey 419, an injunction was granted to restrain the "cutting down of timber or other trees, except at seasonable times and in a husbandlike manner; and likewise from cutting saplings and young trees not fit to be cut as and for the purposes of timber, except in the spring woods, and from cutting anything in the spring woods but in a husbandlike manner, until hearing or further order."

In *Burges v. Lamb* (1809), 16 Vesey 174, the life tenant, it was said, "is at liberty to cut timber, generally, treating it in a husbandlike manner, independent of the effect upon the beauty of the place," excepting equitable w., p. 185. And in *Bridges v. Stephens* (1817), 2 Swans. 150 n., a declaration was made that the tenant for life was entitled "to cut down and apply for her own benefit such timber as is fit and proper to be cut, in the course of a due and husbandlike management of the woods in question." Then in *Smythe v. S.* (1818), 2 Swans. 251, on a motion to restrain the cutting of timber-like trees, Eldon, L.C., said: "A tenant for life, without impeachment of w., is clearly not compellable to cut timber in such way as a tenant in fee would think most advantageous, but is entitled to cut down anything that is timber. This motion requires an affidavit, pledging the deponent, that the trees about to be cut are not fit for timber. It is settled, that a tree which a tenant in fee, acting in an husbandlike manner, would not cut, may be cut by a tenant for life, unimpeachable of w., provided that it is fit for the purpose of timber. A tenant for life, unimpeachable of w., might cut down all these trees,

without question, at law ; and to subject him, in this Court, to the rules which a tenant in fee might observe, for the purpose of husbandlike cultivation, would deprive him of almost all his legal rights. If the trees are so advanced as to become timber, the tenant may cut them down, though they are in a state to thrive, and though cutting them down would injure the saplings. It is not sufficient to state that this is thriving wood ; it must be thriving wood *not fit for the purposes of timber.*"

And see *Lansdowne v. L.* (1815), 1 Madd. 116 ; *Chamberlyne v. Dummer* (1782), 1 Bro. C. C. 166 ; 2 Dick. 600.

In *Ford v. Tynte* (1864), 2 De G. J. & S. 127, the converse doctrine, that an unimpeachable tenant can cut ornamental trees in a husbandlike manner, as laid down in *Halliwell v. Phillips* (1858), 4 Jur. N. S. 607, was overruled by Turner and Knight Bruce, L.J.J., the former of whom said : "According to the law of the Court, as I understand it, the question, what a prudent owner would do in the proper or ordinary course of management, can be no measure of the obligation which attaches in this Court upon a tenant for life without impeachment of w. with reference to the timber planted or left standing for ornament ; for every such tenant for life is bound by the taste, or want of taste, of any absolute owner by whom the timber may have been so planted or left standing ; and so far as the case of *Halliwell v. Phillips* contravenes this opinion, I venture respectfully to dissent from it."

Underwood.—And an injunction will be granted against cutting immature underwood in a proper case. *Brydges v. Stephens* (1821), 6 Madd. 279.

Trivial.—In *Piers v. P.* (1750), 1 Ves. sen. 521, Hardwicke, L.C., dismissed a bill complaining of the removal of some young oak trees.

Where the Mansion House is Pulled Down.—In *Morris v. M.* (1847), 11 Jur. 196, the trustees had power to commit w. with the consent of the defendant, and a power to grant building leases, for which ornamental trees would be a great advantage. The defendant pulled down the mansion house, but the Court held that this, though not impeached by the bill, did not justify the cutting of timber which had been left standing as ornamental to it. The defendant alleged that the settlor had abandoned the mansion house, but the evidence did not support this.

In *Wellesley v. W.* (1834), 6 Sim. 497, there was a power, given by a settlement, for the trustees at the request of the tenant for life to pull down the mansion house and apply the proceeds in liquidating incumbrances, which was done. The trustees had also *power to grant building leases* over the property, which included a park and several villas contiguous thereto. Shadwell, V.C., granted an injunction to protect the whole of the “timber or other trees which were planted and stood or grew in avenues, vistas, or clumps, *or separately or singly*, for the ornament of the park, gardens, and pleasure grounds or other grounds and lands thereto belonging.”

But generally, where there is no mansion, there will be no protection to the trees. Cf. *Newdigate v. N.* (1834), 2 Cl. & Fin. 601.

But in *Micklethwait v. M.* (1857), 1 De G. & J. 504, the testator, who settled two estates by his will, had in 1846 pulled down the mansion house on one of the

estates, had dismantled the curtilage, cut down many ornamental trees, and ceased to maintain the garden, except the kitchen garden, which was let to a market gardener. It was held that, as the testator had himself abandoned the mansion with no intention of rebuilding, the timber and trees which he left standing could not be protected. Knight Bruce, L.J., said at p. 519: "I am of opinion that not any portion of the timber standing on the Beeston Estate, with whatsoever view or object planted, or before the year 1846 preserved, whether in an avenue or otherwise, whether near or not near the destroyed mansion house of Beeston, and whether ornamental or not ornamental to it when it was standing, is, at the instance of any person claiming an interest only under the will, entitled to protection as ornamental timber, or as timber planted for ornament or left standing for ornament. That character, once probably or certainly belonging to it in connection with the late mansion house there, has, in my judgment, never belonged to it in any other manner, nor as between or among any persons claiming title solely under the will, a conclusion consistent, I think, with all the decisions and dicta (so far as my knowledge extends) of Lord Hardwicke, Lord Thurlow, Lord Kenyon, and Lord Eldon upon the subject." Then Turner, L.J., said at p. 525: "It was said for the plaintiff that the testator may have intended that the trees should be preserved as an ornament to the estate without reference to the mansion house, and it was argued, that if the trees were in fact planted or left standing for ornament, it could make no difference whether there was a mansion house on the estate or not; but there is a plain difference between cases in which there is, and cases in which there is not a mansion house on the estate. In the former case, con-

tinued residence may well be presumed to have been contemplated. In the latter it cannot." Powers of sale and exchange do not affect the right to cut trees, *ib.* p. 526.

In *A. G. v. Marlborough* (1818), 3 Madd. 498, Leach, V.C., held on construction of the Acts conferring honours and emoluments upon the first Duke of M. that, although the defendant was tenant in tail, he could not destroy the mansion house of Blenheim, and p. 549: "I am clearly of opinion that the Duke of Marlborough, having no power of destruction over the house, has no power of destruction over timber which is essential to the shelter or ornament of the house." And see pp. 541, 548, and *supra*, p. 174.

Cutting to remedy Results of Tempest.—"If a tempest had produced gaps in a piece of ornamental planting, by which unequal and discordant breaks and divisions were occasioned, it would be going too far to hold that cutting a few trees to produce an uniform and consistent, instead of an unpleasant and disjointed appearance, should be considered w." *Mahon v. Stanhope* (1808), 3 Madd. 523 n., per Grant, M.R.

Decaying Trees.—Though trees are decaying, they must not be cut down, even at the suit of a remainderman, "if for defence and shelter of the house, or for ornament," per Talbot, L.C., in *Bewick v. Whitfield* (1734), 3 P. Wms. 267. But where decaying trees are impeding the growth of other ornamental and preferential trees they may be felled. Thus in *Lushington v. Boldero* (1819), 6 Madd. 149, Leach, V.C.; "referred it to the Master to inquire whether any and which of the timber and other trees cut and sold, injured or impeded the growth of any other trees adjoining thereto, which were of so much

importance to the purposes of ornament or shelter intended by the devisor, that the removal of the timber or other trees so cut and sold was essential to such purposes of ornament or shelter." And where the life tenant has so cut decaying and injurious trees, he is entitled to their proceeds just as if the Court had ordered the cutting. *Baker v. Sebright* (1879), 13 Ch. D. 179, in which the Court followed the same form of inquiry. Jessel, M.R., said at p. 188: "The very notion of preserving ornamental timber was the creation of the Court of Equity; and, therefore, in directing some portions of the timber to be cut down to save the rest, the Court was not contravening its own rules, but carrying them out, the intention of the testator being that, not all ornamental timber, but as much of it as possible should be preserved, consistently with allowing the natural growth of the trees, and so far as they would not destroy one another." But in an ordinary case an injunction would be granted, if applied for before the cutting is completed, so that it may be done under the supervision of the Court, *ib.* So in *Bedoyère v. Nugent* (1890), 25 L. R. Ir. 143, Porter, M.R., said: "I think it may be said that there is no legal limit . . . arising from the state or condition of the particular trees which it is proposed to cut; but that if those trees are injuring others, also ornamental, which it is more desirable to preserve, the Court will not, in that case, interfere with the tenant for life who cuts merely to save from destruction trees of greater value and importance," p. 159 (*f*).

(*f*) By the Highway Act, 5 & 6 Will. 4, c. 50, s. 65, provision is made for the removal, through the initiation of the surveyor, of trees prejudicial to the highway, except

trees planted for ornament, which can only be removed if causing actual obstruction. See *Jenney v. Brook* (1844), 6 Q. B. 323.

Construction.—In *Chamberlyne v. Dummer* (1782), 1 Bro. C. C. 166, 3 ib. 549, 2 Dick. 600, estates were given by will to the defendant during widowhood with “full power and authority to cut timber . . . for her own use and benefit at all seasonable times in the year.” This was construed by Loughborough, L.C., as being equivalent to “without impeachment of w.,” as is evident from the form of the order directing a Common Law action.

Jointress with Special Powers.—In *Aston v. A.* (1749), 1 Vesey 264, Lord Hardwicke said that the jointress without impeachment, who besides having her jointure was entitled to the benefit of a term to raise money out of the rents and profits “to reimburse her expenses in sustaining and repairing her jointure estate,” was not entitled to the ordinary rights of a tenant for life unimpeachable. “Besides, the term for her reimbursement is extraordinary, and absurd to suppose that he meant to leave her at liberty to cut down and strip the estate of every stick of timber (which are the natural botes for repairs), and then to come by this term to be reimbursed her expenses in buying timber for repairs, it being contrary to the plain intent, which was, that she should be tenant for life without impeachment of w., to prevent trouble in little matters; but still that the timber growing on the estate, and the natural fund for it, should be applied for that, but that she should be reimbursed out of this term what she should pay out of her own pocket.” The Court declared that the jointress should not take any benefit of the term for reimbursing, &c., “without making satisfaction for the prejudice done by her to the inheritance of the estate, by cutting down such timber saplings and young trees as were not proper to be felled according to the usual course

of felling timber upon estates in a reasonable and husbandlike manner." Belt's Supplement, p. 134.

Special Inquiry.—In *Marker v. M.* (1851), 9 Hare 1, there was a declaration in the settlement that enough of the most ornamental timber should always remain to preserve the beauty of the place unimpaired, and Turner, V.C., directed a special inquiry, as it might eventually be decided that this clause modified the law as to equitable w.

Overriding Trust.—*Kekewich v. Marker* (1851), 3 Mac. & G. 311, was a case in which estates were vested by a settlement in trustees for a thousand years, for the raising of three separate sums of £10,000, without impeachment save as to ornamental timber, and subject thereto to the defendant for life without impeachment, save as aforesaid, with remainders over. The trustees had special discretionary power to enter and cut timber for raising the said sums, and this was held by Truro, V.C., to override the right of the tenant for life. The power was not in the usual form.

In *Aspinwall v. Leigh* (1690), 2 Vern. 218, 1 Eq. Ca. Abr. 400, the plaintiff had a life estate, unimpeachable, which was subject to a term of 500 years in trustees for the payment of debts and annuities, which term was likely to have a long continuance. The trustees had powers of leasing but none of cutting timber. The Court ordered a commission to go, to take off timber for the relief of the plaintiff, not exceeding £500, he being in great poverty, and there being a great deal of decaying timber on the estates. And in *Bennett v. Wyndham* (1857), 23 Beav. 521, where trustees for similar purposes had power to raise money by rents, timber, and mines (so construed), Romilly, M.R., held that they must exercise their discretion in such

a way as to leave some income for the infant tenant for life.

Perpetuity.—In *Ferrand v. Wilson* (1845), 4 Hare 344, the powers given to trustees of preserving a wood and successively felling the same, and for investment of the proceeds in land, to be settled on the trusts of the will, were held void as tending to a perpetuity; but the trustees were in this instance protected by the Statute of Limitations, as they were trespassers, and had retained no benefit for themselves, nor been fraudulent. Also the existence of a tenancy in tail, which could be barred, prevented the rule against perpetuity acting. *Briggs v. Oxford* (1852), 1 D. M. G. 363.

Practice.—Where a defendant was unimpeachable of w., “other than and except voluntary w. in pulling down houses or buildings and not rebuilding the same or others of equal or greater value,” and had pulled down a house from no evil motive and with the intention, never abandoned, of rebuilding, and where there was no negligence or undue delay, the Court of Appeal (Turner and Knight Bruce, L.J.J.) refused to order him to give security or submit to a receiver. *Micklethwait v. M.* (1857), 1 De G. & J. 504.

Where a remainderman seeks damages for cutting ornamental timber, and not the proceeds of the timber, he is only entitled to the sum representing the amount of injury done to his reversionary interest; in this case to nothing. *Bubb v. Yelverton* (1870), 10 Eq. 465, Romilly, M.R.; *Whitham v. Kershaw* (1885), 16 Q. B. D. 613, C. A.

Trustees.—In *Campbell v. Allgood* (1853), 17 Beav. 623, Romilly, M.R., restrained trustees, not unimpeachable, from cutting ornamental trees, of which three had

already been improperly cut at the request of the tenant, holding that they were not so prejudicial to the house as to justify the cutting. Qu. whether trustees with power of leasing have not authority so to cut, as to satisfy a reasonable tenant. The bill was dismissed as against the tenant, who was not shown to threaten w., and the costs were allowed out of the estate.

Form of Order.—The form of order in *Ford v. Tynte* (1864), 2 De G. J. & S. at p. 134, was as follows: That an inquiry be made whether the woods called Long Thicket, Chicke's Thicket, and Ford's Coppice, or any or either and which of them, and the six elm trees and one oak tree on Lovedere Farm, and the oak trees and elm trees in the pasture land on West Bower Farm, which have been marked for cutting, or any or either and which of such trees, were or was or have or has been planted or left standing by any owner in fee or in tail of the Hallswell Estate, or any part thereof, for the ornament or shelter of the mansion house on the said estate, or of the gardens, park, or pleasure grounds thereto belonging, or of any road or roads, drive or drives, path or paths leading thereto, or for the purpose of intercepting the view of any object or objects intended to be kept out of sight from the said mansion house, gardens, park, or pleasure grounds or any part thereof; and in case it shall be so found as to the said woods or any or either of them, then let further inquiry be made whether the trees therein have, ordinarily or otherwise and under what circumstances, been cut for repairs or for sale, and what estate or interest the person or persons by whom or by whose order or direction the same were so cut had in the said Hallswell Estate at the time of the cutting thereof, and whether the trees in the said woods and the said other trees which have been

marked for cutting, or any or either and which of such trees, injure or impede the growth of any other trees adjoining or near thereto which are of so much importance to the purposes of ornament or shelter to the said mansion house, gardens, park, or pleasure grounds as that the removal of the trees so marked for cutting is essential to such purposes of ornament or shelter.

As to the disposal of the proceeds of equitable w., see p. 198. As to account of profits, see Index.

WHO IS ENTITLED TO THE PROCEEDS OF WASTE?

Collusion.

Cutting under Order of the Court.
Windfalls.

N.B.—The law by which the proceeds of wrongful cutting of timber, whether by the tenant for life, a stranger, or a tempest, belongs to the owner of the first existing estate of inheritance, applies only to legal limitations. Where the estates are vested in trustees, they hold the proceeds as part of the trust estate. Trustees to preserve contingent remainders, having only a contingent estate, cannot take the proceeds. *Garth v. Cotton* (1753), 1 W. & T. L. C.

The Owner of the First Estate of Inheritance.—When a termor commits w., he that has the immediate estate of inheritance is entitled either to bring trover for the things severed, or money had and received for their value, or an account in Equity. *Seagram v. Knight* (1867), 2 Ch. 628, per Chelmsford, L.C., at p. 632: "When the tree is severed, the property thereof belongs to him in the remainder in fee." *Paget v. Cary* (1583), 5 Co. 76 *b*. So in *Lewis Bowles' Case* (1616), 11 Coke 79 *b*, it was "resolved (5) That if tenant for life or for years fells timber or pulls down the houses, the lessor shall have the timber . . . (*Liford's Case*, *ib.* 48 *a.*) 1. It is apparent in reason that the lessee had them but as things annexed

to the soil, and therefore it would be absurd in reason, that when by his act and wrong he severs them from the land, he should gain a greater property in them than he had by the demise. 2. It is without question (as it is resolved in the said case), that the lessor has the general ownership and right of inheritance in the houses and timber trees, and the lessee has but a particular interest, and therefore be they pulled down or felled by the lessee or any other, or by wind or tempest blown down, or by other means disjoined from the inheritance, the lessor shall have them in respect of his general ownership, and because they were his inheritance, &c. . . . And it was resolved, if a house falls down (1 Coke 63 *a*; Co. Lit. 53 *a*) *per vim venti* in the time of such lessee for life or for years, or in the time of the tenant in dower or tenant by the courtesy, &c., that such particular tenants have a special property in the timber to rebuild the like house as the other was for his habitation; as if they fell a tree for reparation, they have a special property to that purpose in it." And see the other cases there referred to, and *Berry v. Heard* (1622), Cro. Car. 242; Palmer 327, and many others relating chiefly to forms of action and not now of importance.

That he is entitled and not any intermediate tenant for life, impeachable for w., or any possible owner of the inheritance yet unborn, is shown by numerous cases, *e.g.*, *Herlakenden's Case* (1589), 4 Coke 62 *a*; *Udal or Uvedale v. U.* (1649), Aleyn 81, 2 Rolle Abr. 119 (*a*).

There are three principal exceptions to the Common Law doctrine which have been established by the Courts of

(*a*) And so, *Bewick v. Whitfield* L.C.; and see *Gower v. Eyre* (1815), (1734), 3 P. Wms. 267; *Lee v. Alston* Cooper 156; *Blaker v. Anacombe* (1789), 3 Bro. C. C. 37, per Thurlow, (1804), 1 Bos. & P. N. R. 25.

Equity, and these together with the main proposition of law are nowhere better expressed than by Jessel, M.R., in *Honywood v. H.* (1874), 18 Eq. 306 (trees had been cut under orders of the Court), where he says at p. 311: "If the timber is timber properly so called, that is, oak, ash, and elm over twenty years old (I am not saying anything about exceptional cases), the property in the timber cut down, either by the tenant for life or anybody else, or blown down by a storm (*b*), belongs at law to the owner of the first vested estate of inheritance. There is in Equity an exception where the remainderman, the owner of the first vested estate of inheritance, has colluded (p. 199) with the tenant for life to induce the tenant for life to cut down timber, and then Equity interferes and will not allow him to get the benefit of his own wrong. There is, again, a second equitable exception, and that is this (p. 201): that where timber is decaying, or for any special reason it is proper to cut it down, and the tenant for life in a suit properly constituted, to which the remainderman or the owner of the vested estate of inheritance is a party, gets an order of the Court to have it cut down, there the Court disposes of the proceeds on equitable principles, and makes them follow the interests in the estate. In that case, therefore, the proceeds are invested and the income given to the successive owners of the estate, until you get to the owner of the first absolute estate of inheritance, who can take away the money. The same course, as I understand it (there is a decision of Lord Lyndhurst, in *Ormond v. Kynnersley* (1829), 7 L. J. 150 (*c*), the other way, but modern decisions have settled the law), is adopted in the case of the commission of equitable w., that is, where

(*b*) As to which, see *infra*, p. 206.

(*c*) *S. C. Butler v. K.* (1830), 8 L. J. 67.

ornamental trees, or trees which could not otherwise be cut down even by a tenant for life unimpeachable for w., are cut down; there also, as I understand it, the proceeds are invested so as to follow the uses of the settlement, that is, to go along with the estate according to the settlement giving the income to the tenant for life, and so on."

Back Interest.—In *Bagot v. B.* (1863), 32 Beav. 509, a compromise was ultimately arrived at, but Romilly, M.R., in delivering judgment declined to allow interest against the estate of the waster, on account of lapse of time and the consequent expense, but held that the amount received for the timber improperly cut and the minerals improperly gotten prior to the birth of the plaintiff (tenant in tail) should be invested as part of the settled estate; that as to that cut and gotten after his birth, he was entitled to the whole amount, as first tenant in tail, with interest at £4 per cent. from the times the moneys were received (d); that all the amounts for timber and coal properly cut and gotten should be invested as part of the settled estate, and the estate of the waster only charged with interest from his death. The M.R. intimated at p. 523 that he must not be held to assent to the main doctrine established in favour of the owner of the first vested estate of inheritance; but the point did not arise for decision, and was expressly dissented from by Jessel, M.R., *In re Caven-dish*, W. N. 1877, p. 198.

Judicious Cutting by Life Tenant.—Where the cutting by a tenant for life is such as the Court would have ordered—of decaying, injurious, or depreciating trees—the interest on the fund realised will be paid to the life tenant, as in *Waldo v. W.* (1841), 12 Sim. 107, per

(d) See also as to interest, *Garth v. Cotton*, *infra*, p. 199; *Phillips v. Homfray* (1892), 1 Ch. 465.

Shadwell, V.C. (e); *Lowndes v. Norton* (1877), 6 Ch. D. 139, per Hall, V.C.

Unimpeachable Life Tenant.—In *Gent v. Harrison* (1859), John. 517, successive tenants for life had cut timber and invested the proceeds in the names of trustees to preserve contingent remainders, receiving the income themselves. An unimpeachable life tenant on coming into possession claimed the capital and all interest. Page Wood, V.C., said: "Where the timber is properly cut, the purchase money of the timber follows the land, and the tenant for life, although impeachable for w., receives the income during his life; and when you reach the first tenant for life unimpeachable for w., . . . he takes the capital." But he held that this only applies to a rightful cutting or one adopted as such; that here the plaintiff was treating it as wrongful, and so the case could not be decided in the absence of the heir, who at the time of the cutting was owner of the first estate of inheritance. Eventually the plaintiff adopted the cutting and took the capital (f).

So in *Gresley v. Moseley* (1862), 3 De G. F. & J. 433, before Turner and Knight Bruce, L.J.J., where the plaintiff, upon the death of a tenant for life, became tenant in tail in possession, and succeeded in setting aside a purchase from the testator to his solicitor, who had, since the testator's death, sold some of the property and opened and worked mines, the plaintiff was not allowed interest on the sum found due from the estate of the solicitor, as he in his bill had offered to confirm the sales. "He could not otherwise be entitled to the moneys produced by those sales, and he cannot, I think, be permitted

(e) Cf. *Phillips v. Barlow* (1844), 14 Sim. 263.

(f) See *Lowndes v. Norton* (1877), 6 Ch. D. 139.

to say that the sales were rightful, so as to entitle him to the purchase moneys, but that the mines were wrongfully opened, so as to entitle him to the interest which he claims," per Turner, L.J.

Equitable W.—Not only does a tenant for life lose all benefit in the proceeds of w., as is said in *Seagram v. Knight* (1867), 2 Ch. 628, but in the case of an unimpeachable tenant, who commits equitable w., Equity follows the law so far as to deprive him of all interest, but "does equity" in declaring the proceeds to form part of the settlement fund, which must be invested and paid out to the person who is entitled to the first estate of inheritance on the death of the life tenant. *Wellesley v. W.* (1834), 6 Sim. 497, per Shadwell, V.C. And he will be paid both the principal and the accumulations. *Lushington v. Boldero* (1851), 15 Beav. 1, per Romilly, M.R. (S.C. at other stages, 6 Madd. 149, Cooper 216.)

It is difficult to say what is the effect of s. 25, sub-s. 3 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), whereby it is enacted that "An estate for life without impeachment of w. shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit w. of the description known as equitable w., unless an intention to confer such right shall expressly appear by the instrument creating such estate." It will be remembered that the whole foundation for the interposition of Equity was the existence of the legal right whereby the timber or minerals severed became the property at law of the tenant unimpeachable for w., that Equity then seized on his conscience, and defeating his legal right, preserved the value of the w. as part of the settled property, depriving the waster of all interest. But where there is no legal right, there is no ground for the interposition of Equity, and the absence

of legal right in the tenant for life sets up the legal right of the owner of the first vested estate of inheritance, for all property must vest in some one. This sub-s. does not apply to any tenant but a tenant for life. Probably the Courts will be ingenious to find a way of upholding the former law.

Representatives.—In *Lansdowne v. L.* (1815), 1 Madd. 140, the representatives of one who had committed equitable w. were held liable to account for the profit made by him.

Construction.—Where a testator had directed trustees pending the birth of a tenant in tail to pay “rents and profits” to the person next in remainder, Thurlow, L.C., held that proceeds of timber wrongfully cut by a preceding life tenant, but sold under the order of the Court, should go in the same manner. *Dare v. Hopkins* (1788), 2 Cox 110; cf. *Ferrand v. Wilson* (1845), 4 Hare at p. 373.

In *Blake v. Peters* (1863), 1 De G. J. & S. 345, C. A., the estate of a tenant in fee simple subject to an executory devise over and a clause of forfeiture on cutting except for repairs, was held liable to refund the value of timber cut with interest from his death.

COLLUSION.

The celebrated case of *Garth v. Cotton* (1753), 1 W. & T. L. C., before Lord Hardwicke, was the first case in which the Court of Chancery intervened to prevent the misuse of legal powers in a matter of collusive w., agreed on and carried out by tenant for life and remainderman. It was there decided that where by collusion between the life tenant and the owner of the first vested estate

of inheritance, timber was cut in fraud of a plaintiff, then unborn, but who upon his birth became owner of a prior vested estate of inheritance, the Court would decree satisfaction (amount admitted in this case), with interest at £4 p.c. (g) from the filing of the bill. "There is," said Lord Hardwicke, "in the cases put of trees fallen by accident, or merely by the wrongful act of a stranger or of the tenant for life, no ground of equity to take it from him (i.e., the remainderman). But here comes in the force and operation of the collusion in this case. The destruction being made by contrivance and collusion with the remainderman, and affecting his conscience, obliges this Court to pursue its known maxims in laying hold of it either by restraining the act before it be completed, or decreeing satisfaction for it afterwards; for, in all cases where a legal right is acquired or exercised by fraud or collusion, contrary to conscience, it is the office of this Court to enjoin it, or decree a compensation."

This case was followed by Lord Thurlow in *Williams v. Bolton* (1784), 1 Cox 72, where the tenant for life was also owner of the first vested estate of inheritance. He was ordered to pay into Court the produce of the w. with interest at £4 p.c., there to accumulate until the death of the tenant for life for the benefit of the person who should then appear to be entitled, as it was possible a still earlier remainderman might be born. In the event no such person was born, and on the death of the tenant for life an order was made giving the interest on the sum in Court to the next tenant for life, then her children took an estate in tail male, remainder to the wrong-doer in fee simple. It does not clearly appear what was done with

(g) As to interest, see *Bagot v. B.*, *supra*, p. 196; *Phillips v. Homfray* (1892), 1 Ch. 465, and Index.

the interest accumulated during the life of the waster, but probably it was capitalised. *Powlett v. Bolton* (1797), 3 Vesey 374.

But where the owner of the first vested estate of inheritance has acquiesced and encouraged an arrangement between the first tenant for life and the next, who was unimpeachable of w., under which the latter cut timber, she was restrained from bringing an action at law. *Aston v. A.* (1750), 1 Vesey 396.

In *Birch-Wolfe v. Birch* (1870), 9 Eq. 683, James, V.C., refused to apply the principle of *Garth v. Cotton* on the ground that the w. was trivial.

CUTTING UNDER ORDER OF THE COURT.

Wherever timber required cutting and there was no one in possession of the estate with a right to cut, it was formerly necessary in all cases to commence an action in the Court of Chancery to have the timber cut under the direction of the Court.

To a great extent this necessity has been met by the Settled Land Act, 1882, which enacted in s. 35, sub-s. 1 (see Appendix), that "Where a tenant for life is impeachable for w. in respect of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an order of the Court, may cut and sell that timber, or any part thereof (sub-s. 2). Three fourth parts of the net proceeds of the sale shall be set aside as and be capital money arising under this Act, and the other fourth part shall go as rents and profits." This is a distinct gain to the tenant for life, who was formerly only entitled to the interest on the invested proceeds.

Previous to this the only statute affecting the point was (1856) 19 & 20 Vict. c. 120 (Leases and Sales of Settled Estates, see Appendix), which empowered the Court of Chancery to "authorise a sale of the whole or any parts . . . of any timber (not being ornamental timber) growing on any settled estates" (s. 11).

Apart from these Acts the law stood as follows: Where timber, not being timber standing for ornament or shelter, was decaying or injuring the growth of other timber, and there was no one entitled to cut, an application could be made to the Court of Chancery in an action (*h*) to authorise a cutting and sale. As a general rule timber wrongfully felled belongs to the owner of the first estate of inheritance, but where the cutting is ordered or ratified by the Court, "the proceeds are invested, and the income given to the successive owners of the estate, until you get to the owner of the first absolute estate of inheritance, who can take away the money." *Honywood v. H.* (1874), 18 Eq. at p. 311; *Seagram v. Knight* (1867), 2 Ch. 628; see, too, *Tooker v. Annesley* (1832), 5 Sim. 235 (form of reference (*i*)); *Waldo v. W.* (1835), 7 Sim. 261; *Tollemache v. T.* (1842), 1 Hare 456; *Field v. Brown* (1859), 27 Beav. 90; *Joddrell v. J.* (1869), 7 Eq. 461.

Dowress.—A dowress is, until her dower land is set out by metes and bounds, in the same position as a life tenant, and is entitled to the interest of one-third of the

(*h*) Or on petition under special Acts, *A. G. v. Marlborough* (1820), 5 Madd. 280. Orders were stated to be of modern origin by Lord Eldon in *Burges v. Lamb* (1809), 16 Vesey, at p. 182.

(*i*) The form of order in *Tooker v. Annesley* was "to inquire and state whether there were any and what timber trees standing in the woods

and plantations on the testator's estates, which were in a state of decay, and which would not improve by standing, or the standing of which would be prejudicial to the other trees, and which it would be for the benefit of all parties interested in the estates to have felled and sold." Shadwell, V.C.

proceeds of a sale of timber. *Bishop v. B.* (1841), 10 L. J. Ch. 302; *Dickin v. Hamer* (1860), 1 Drew. & Sm. 284.

Although the Act of 1882 does not expressly except timber standing for shelter, it is probable that the Court would restrain a tenant for life threatening to cut such trees, whether decaying or not. *Lushington v. Boldero* (1819), 6 Madd. 149, &c.

Unimpeachable Tenant for Life.—The authorities that a tenant for life unimpeachable for w. is entitled to the capital sum upon the determination of the estates for life preceding are too numerous to mention, but reference may be made to *Gent v. Harrison* (1859), Johnson 517; *Lowndes v. Norton* (1877), 6 Ch. D. 139. Even a direction to trustees to pay mortgage debts out of “rents and profits” will not deprive such a tenant for life of his rights, *Lovat v. Leeds* (1862), 2 Drew. & Sm. 75; *Aspinwall v. Leigh* (1690), 2 Vern. 218, see pp. 149, 152; though an overriding power for the same purpose will, *Briggs v. Oxford* (1852), 1 D. M. G. 363.

Infant.—Where there is an infant tenant (in tail, &c.) in possession the Court authorises all proper cutting in due course; but where he is a remainderman, only decaying trees and those injuring the growth of other trees are cut. *Mildmay v. M.* (1792), 4 Bro. C. C. 76; *Delapole v. D.* (1810), 17 Vesey 150; *Hussey v. H.* (1820), 5 Madd. 44; *Ferrand v. Wilson* (1845), 4 Hare, at p. 382. And in *Delapole v. D.*, u.s., the Court directed an inquiry where the life tenant would have forfeited his estate to the infant remainderman if he had himself cut the trees. A similar course was adopted in *Peters v. Blake* (1837), 6 L. J. Ch. 157, and *Lygon v. Beauchamp* (1832), ib. 158. The proceeds will be invested to follow the trusts of the settlement. Now by s. 42 of the

Conveyancing and Law of Property Act (1881), trustees for infants appointed for the purpose and trustees for sale have large powers of felling timber and underwood, see p. 274.

A wrongful cutting cannot be ratified by the Court, and on the other hand any one who cuts wrongfully will be deprived of all interest in the proceeds. He who cuts in this manner commits a tort and should be sued for damages outside the settlement, even when they are trustees acting, though *bonâ fide*, under a void power. *Ferrand v. Wilson*, u.s. The Statute of Limitations, however, runs from the time of cutting, though its operation is suspended during the time, if any, that the person who cuts is legal personal representative to the owner of the first estate of inheritance. *Seagram v. Knight* (1867), 2 Ch. 628, and see Index.

Ratification of Proper Cutting.—The Court will adopt and ratify a cutting which it would itself have authorised, though it is dangerous to act without previous sanction. "There can be no doubt that what a trustee would be ordered by the Court to do is valid if done by him without the previous authority of the Court. But I do not see how that rule of Equity can apply to a case where the act when done was wrongful. . . . The remainderman in fee being at the time of the first cutting under age, I do not think that the Court would have been justified in ordering the timber to be cut upon the application of the tenant for life, merely because it was ripe for cutting." *Seagram v. Knight*, u.s., per Lord Chelmsford, L.C. And see *Lowndes v. Norton* (1877), 6 Ch. D. 139; *Waldo v. W.* u.s.; *Gent v. Harrison*, u.s. Cf. *Baker v. Sebright* (1879), 13 Ch. D. 179, where a tenant for life unimpeachable of w. had cut trees, decaying and injurious to other orna-

mental trees, and the Court held him entitled to the proceeds, and *Bagot v. B.* (1863), 32 Beav. at p. 522.

Descent of Sale Moneys.—The sale moneys remain realty for the purpose of descent during the time that the settlement continues to operate on them, *Field v. Brown* (1859), 27 Beav. 90; though in this case the timber was cut on an estate which was settled on Esther Field for life, remainder to her children in tail (she died childless), and in the events which had happened, remainder to herself in fee simple; and the M.R. (Romilly) held the timber-moneys remained realty until the termination of her life estate. Her legal personal representatives were not before the Court. And see *Seagram v. Knight*, u.s. *Phillips v. Daycock* (1867), W. N. 54.

In *Dyer v. D.* (1865), 34 Beav. 504, timber was cut on the estate of a tenant in fee simple, subject to an executory devise over, and this was held to devolve as personalty on his death without issue and under twenty-one, when the gift over took effect. As he was without impeachment of w. (see p. 147), the inquiry was too limited, and his estate did not get the benefit of the full cutting. The inquiry and order for cutting applied only to decaying, deteriorating, and prejudicial trees, which might be cut for the benefit of all parties interested.

Special Case.—In *Claxton v. C.* (1690), 2 Vern. 152, where there was a devise to the testator's widow for life, remainder to the plaintiff in fee upon condition that he should pay certain legacies, with a gift over on non-payment, the Court said it was reasonable that the plaintiff should have liberty "to take off the timber, making satisfaction to the widow for breaking the ground by carriage, w., &c."; and a reference was directed to the Master to see what quantity of timber was necessary to

be felled for payment of the legacies and what might conveniently be spared, leaving sufficient for repairs. But this case seems inconsistent with the ordinary rights of a life tenant to shade and mast.

The fund might be ordered to be laid out in lands to be settled to the same uses, as in *Wickham v. W.* (1815), 19 Vesey 419, Cooper 288; *Mildmay v. M.* (1792), 4 Bro. C. C. 76; *Delapole v. D.* (1810), 17 Vesey 150; or in discharging incumbrances on the lands, *Lewis v. Cray* (1798), cited in *Tooker v. Annesley*, *infra*, at p. 242. And now see and consider the provisions of the Settled Estates Act, Settled Land Acts, and Improvement of Land Act (Appendix).

Reference.—As to the form of reference to a Master, see *Tooker v. Annesley* (1832), 5 Sim. 237; followed in *Tollemache v. T.* (1842), 1 Hare 457, and by *Consett v. Bell* (1842), 1 Y. & C. C. 569, where there was an infant devisee for life, unimpeachable for w. And see *Baker v. Sebright* (1879), 13 Ch. D. 179.

Investment.—Sale moneys may be invested in permanent improvements. See *Newman's S. E.*, p. 235, &c.

WINDFALLS.

In *Herlakenden's Case* (1589), 4 Coke 63 *a*, "it was resolved that if trees being timber are blown down by the wind, the lessor shall have them (for they were parcel of his inheritance) and not the tenant for life or tenant for years; but if they be dotards without any timber in them, the tenant for life or tenant for years shall have them." And see the *Countess of Cumberland's Case* (1611), Moore 812.

In *Lewis Bowles' Case* (1616), 11 Coke 79 *b*, 1 Rolle 181, it is said that windfalls "which are fuel belong to the

lessee; but if they are timber, they are the lessor's without question." As regards the timber, if the lessee requires it to build the messuage, see p. 194. And it is further said in the same place that windfalls which are not timber belong to the lessee. (So Broke 39, 82, of fruit trees, &c.) As to the rights of a life tenant dispunishable, see S. C., *supra*, p. 146, *Englefield's Case* (1591), Moore 317 *arg.*

In *Bateman v. Hotchkin* (1862), 31 Beav. 486, Lord Romilly said: "The tenant for life is entitled to have the benefit of the sale of all such trees felled by the wind as he would be entitled to cut himself, and to all fair and proper thinnings, and to all coppices cut periodically in the nature of crops."

As has been seen above, p. 194, this is one of the cases in which the Common Law operates, uncontrolled by Equity, to give the fallen timber to the first owner of the inheritance in esse, *Lewis Bowles' Case*, u.s.; *Udal v. U.* (1649), Aleyn 81. "An estate in contingency is no estate, and the trees must become the property of somebody, and therefore the first remainderman of the inheritance in being takes them." *Garth v. Cotton* (1753), 1 W. & T. L. C. The same opinion was expressed by Hardwicke, L.C., as an obiter dictum in *Aston v. A.* (1750), Belt's Sup. 175. See *Bewick v. Whitfield* (1734), 3 P. Wms. 267.

Regular Course of Cutting Trees, not Timber. — In *Harrison's Trusts* (1884), 28 Ch. D. 220, 170 acres of larch plantations, part of an estate of 434 acres, were conveyed by a marriage settlement to trustees upon trust for sale, so becoming personal estate. The trustees were directed to pay the income, after deducting the outgoings which they might think fit to pay, to (in effect) the plaintiff for life, with remainders over. The management of the larch plantations is thus stated in the report:

“For many years a portion of the income of the estate had been derived from the annual thinning of the larch plantations and the sale of the larch trees so cut down; this for the last five years had averaged rather more than £400, and for the last three years £500. The income of the rest of the estate was about £805 a year. The larch plantations had been cultivated in the manner customary in the country, that is to say, the land intended to be planted having been enclosed and properly prepared, young larches are planted to about 2,500 to an acre. For the first fifteen years the young trees are pruned and thinned, but there is no profit from them, and very little from the land on which they are planted, but when the trees attain the age of fifteen years they are regularly thinned, in order to allow the proper growth of the trees not cut. For about five years the thinnings are of comparatively little value, but when the trees are about twenty years old the thinnings are sold for prop wood in coal-mines, and the pasturage in the plantation improves from the thinning. In another ten years the remaining trees begin to mature and become fit to be used as ‘pit-wood’ for the hematite iron ore mines in the neighbourhood, and from that time till they are about fifty years old the plantations are thinned regularly for that purpose. At that time it becomes advisable to clear and replant, and the same process is repeated.”

With the exception of between thirty and forty acres, the damage done by gales in the winter of 1883-4 was so great that the rest of the plantations were, by the advice of the estate agent, cleared for replanting. On the hearing of the appeal further evidence was given to the effect that “the average income from the plantations since the date of the settlement had been about £200; that if no

storm had occurred the probable income from the thinnings would have been about £500 for two or three years longer, that the income would then have fallen to about £250 for about fifteen years, and then it would have become necessary to begin to clear the plantations. After the clearing, the plantations would have to remain bare for three or four years, and then would be replanted. The herbage under the trees was let for feeding sheep at about four shillings an acre." Baggallay, L.J., after remarking that larch are not subject to the same rules as timber trees, and that they do not throw up shoots from stools, said: "I think that the cultivation of this estate should go on exactly as it would have done in accordance with the general custom of managing property of this kind, and in the same way as if there had been no accident such as has been described. . . . I have come to the conclusion that the just and equitable arrangement would be to make an allowance to this lady, in respect of the larch plantations, at the rate of £250 a year, and to direct that, if necessary, that sum should be made up by a sale of an adequate portion of the capital. That must, unless this lady lives very far beyond the ordinary period of life, still leave a considerable amount for the children. And, if she does live an additional period of time, which we all hope she may do, the newly-planted estate will become a very valuable estate for her children, and they will get the benefit in that way. . . . We must order the trustees to expend so much money as is necessary in properly renewing the plantations and keeping them as plantations, and to invest the residue of the money, and then to make the lady the allowance I have mentioned."

Realty or Personality.—In the case of *In re Ainslie* (1885), 30 Ch. D. 485, a discussion arose between devisees

and executors as to whether certain larch trees, which had been blown down in the lifetime of the testator, were real or personal estate. The Court of Appeal held that the question as to whether a tree were alive was immaterial, and that the only question to be considered was whether each individual tree was severed, attention being paid to the position of the roots exclusive of the minuter filaments. Cf. *Llewellyn* (1887), 37 Ch. D. 317, at p. 324.

PERMISSIVE WASTE (a).

By Termor.

By Life Tenant, not holding by Agreement.

These two are kept distinct, as the decisions have gone on separate lines; but in the nature of things the liabilities of the tenancies are the same.

PERHAPS no portion of our subject has occasioned so much difficulty and debate as the question whether or not a tenant is liable *ratione tenuræ* for permissive w. The passage most often quoted in support of the tenant's liability is from 2 Inst. 145, where Lord Coke says: "To do or make w., in legal understanding in this place, includes as well permissive w., which is w. by reason of omission, or not doing, as for want of reparation, as w. by reason of commission, as to cut down timber trees, or prostrate houses or the like; and the same word hath the Statute of Glouc., c. 5, *que aver fait w.*, and yet is understood as well of passive, as active w., for he that suffereth a house to decay, which he ought to repair, doth the w. &c." So Co. Lit. 53 *a* and *b*, 57 *a*. The negligent firing of a house is no doubt w., Co. Lit. 53 *b*, though not the accidental, since 6 Anne, c. 31; 8 Bacon 388. The words in 2 Inst. 145 are in themselves rather indistinct. What ought he to repair? "Though there be no timber growing

(a) See 8 Bacon 386, 391; 22 Viner 438, 443; 7 Comyn 652.

upon the ground, yet the tenant at his peril must keep the houses from wasting"; but this goes too far, and there are no authorities quoted for the proposition, those in the marginal note being referred to for the next dictum—that no action lies against him that repairs before action brought. *Anon.* (1568), 3 Dyer 276 *a*; *Whelpdale's Case* (1605), 5 Co. 119. If we turn to Co. Lit. 53 *a*, we shall find that the learned author held that a tenant is not liable for all permissive w., at any rate in the old statutory action. Thus he says that it is no w. to allow a house or wall to decay or fall down if it were uncovered or ruinous when the tenant came in, *Bedford v. Smith* (1553), Dyer 108 *b*; *Ward v. Dettensam* (1561), Moore 54, pl. 158; *Maleverer v. Spinke* (1538), Dyer 35 *b*. And it appears from Lord Hale's notes that such structures might even be abated by the tenant, *ib.* & 22 Viner 443. But Lord Coke further says that suffering houses "to be uncovered, whereby the spars or rafters, plaunchers or other timber of the house are rotten," is w., Lord Hale adding, "but the bare suffering them to be uncovered, *without rotting the timber*, is not w., 9 Jac. C. B., *Knoll's Case*." Again, "If for not scouring of a ditch or mote, *the groundsells of the house are putrefied*, or trees cut down which are in defence of the house, *whereby the house by tempests is blown down*, w. shall be assigned." *Sticklehorne v. Hatchman* (1586), Owen 43. And if a house be uncovered by tempest, this is not w.; but if the tenant suffer it to remain uncovered, *so that the timber is decayed*, this is w., 12 Hen. 4, 5. Broke, Condition, pl. 40. So if by reason of want of repair, the house is demolished by tempest. *Anon.* (1564), Moore 62, pl. 173. But the tenant is not liable for the falling down of a house which was ruinous at the time of the lease, though he may cut timber to repair it,

Broke, W. 130, Co. Lit 53 *a*, 8 Bacon 391; but not if he himself is responsible for the w., ib.

Resulting Damage.—The position then seems to be this—that a tenant is not in general responsible for permissive w., where not followed by actual substantial damage to the premises. And with this agree many of Lord Coke's placita, *e.g.*, where he says that to suffer the pale to decay, *whereby the deer is dispersed*, is w.; so in 2 Rolle Abr. 815, suffering a wood to be open is w., *if beasts enter and eat the germins*; so where a tenant "suffers groundsell to w." by allowing dirt, &c., to accumulate, 22 Viner 447.

Again (Co. Lit. 53 *b*) "It is w. to suffer a wall of the sea to be in decay, so as by the flowing and reflowing of the sea, the meadow or marsh is surrounded, whereby the same becomes unprofitable; but if it be surrounded suddenly by the rage or violence of the sea, occasioned by wind, tempest or the like, without any default in the tenant, this is no w. punishable. So it is, if the tenant repair not the banks or walls against rivers, or other waters, whereby the meadows or marshes be surrounded, and become rushy and unprofitable." It is to be observed on this, that the learned commentator nowhere says that the mere permitting the banks to be out of repair is w., but only where there follow consequences injurious to the premises in demise.

The cases which he cites in the marginal note, to support the proposition, are, *Anon.* (1564), Moore, p. 62, where w. was assigned in a marsh, for that the lessee suffered a wall of the sea adjoining the said marsh to be ruinous, whereby per fluxum et refluxum maris the land was surrounded. Dyer, C.J., said: "It seems reasonable that if there was a small breach in the bank or wall, and the

lessee did not repair, but suffered it to continue, so that afterwards the violence of the sea burst the wall and surrounded the land, that this is w.; but if it was suddenly done by the violence of the water, then this could be pleaded in bar of the action. But he said that it was a rare case and asked the clerks if they had any precedents of such an assignment, and they said that they had not"; and the other was *Griffith's* (1564), ib. p. 69. "Walter Griffith assigned w. in that the lessee suffered the banks of the river Trent, which flowed through the said lands, to be unrepaired, whereby the water burst the banks and surrounded the lands *by default of the lessee*. It was held by all the Justices that this was w., because the Trent is not so violent but that the lessee by his policy and industry could well preserve the banks, and cause the water to flow within its limits. But the violence of the sea is such, that it cannot by any policy be restrained; wherefore if by tempestuousness the sea bursts the walls and surrounds the land this is no w." And on the other hand is a decision by Lord Eldon in *Coffin v. C.* (1821), Jac. 70, refusing an injunction to protect premises from the effect of the sea.

There was no decision in the case of 20 H. 6, 5, referred to in 2 Rolle Abr. 816, where the author says, "much more if arable land is surrounded by such default, for the surrounder washes away the marl and other manurance of the land." Broke, W. pl. 12, doubts these dicta. Rolle, however, adds that if a man permits a room to be in decay by want of plastering so that the timber becomes putrid, &c., an action of w. lies. And he refers to three cases, *Weymouth v. Gilbert*, 8 Car.; *Nowell v. Douning*, 9 Car.; *Corbet v. Stonehouse*, 9 Car., all in Banco Regis. Lastly it appears

that Lord Coke included in permissive w. destruction which was caused by a stranger through the sufferance of the tenant, and many expressions are to be so explained.

Tenants at Will.—We should next notice a class of case, viz., that referring to tenants at will, with regard to whom it was first held that there was no responsibility for permissive w. This was decided in the *Countess of Shrewsbury's Case* (1600), 5 Co. 13 *a*, and this was followed by the numerous cases mentioned below (*b*).

Lessees for Term of Years.—But as regards tenants from year to year or for longer periods the cases seem to recognise some responsibility in the tenant, derived from Lord Coke's views mentioned above, though the present author believes that there has been no reported case since the sixteenth century in which such responsibility has been the subject of an action directly seeking to enforce it. Thus Lord Mansfield said in *Taylor v. Whitehead* (1781), 2 Douglas 745, "By the Common Law, he who has the use of a thing ought to repair it," a proposition rather too wide in statement; again in *Ferguson v. —* (1797), 2 Esp. 590, 5 R. R. 757, Lord Kenyon held that a tenant from year to year was only bound "to make fair and tenantable repairs, such as putting in windows and doors that have been broken by him, *so as to prevent w. and decay of the premises.*" Then Lord Tenterden at Nisi Prius said in *Auworth v. Johnson* (1832), 5 C. & P. 239, that such a tenant "is only bound to keep the house wind

(*b*) *Gibson v. Wells* (1805), 1 Bos. & P. (N.R.) 290; *Herne v. Benbow* (1815), 4 Taunt. 764 (both, however, being decisions that an action on the case would not lie for nonfeasance);

Horsefall v. Mather (1815), Holt N. P. 8; *Brown v. Crump* (1815), 1 Marshall 567; *Harnett v. Maitland* (1847), 16 M. & W. 257.

and water tight" considering the state of the premises when he took them; and in *Torriano v. Young* (1833), 6, ib. 8, Taunton, J., held that "he is not liable for mere wear and tear of the premises." Lastly in *Leach v. Thomas* (1835), 7 ib. 327, Patteson, J., said: "As the defendant was tenant from year to year only, he was not bound to do substantial repairs; he was only bound to keep the premises wind and water tight." And see the remarks of the Judges in *Wise v. Metcalfe* (1829), 10 B. & C. 299; 5 Man. & R. 235.

Whether the tenant is liable for permissive w. or not, it is clear that an action can only lie for that which would be w. if there were no stipulation, "it could not be w. to leave the premises in a worse condition than A.B. had put them into," per Gibbs, C.J., in *Jones v. Hill* (1817), 7 Taun. 392.

Whether Lessees Under Powers may be made Dispunishable (c).—We next come to the cases of leases granted under powers, and it is submitted in advance that *Yellowly v. Gower* is correct, and that *Davies v. D.*, which was intended to follow it, is incorrect.

In *Yellowly v. Gower* (1855), 11 Ex. 274, where the tenant for life under a settlement, himself dispunishable for w., had an express power of leasing, "so that the tenants were not by any clause or words therein to be contained to be made dispunishable for w. or exempted from punishment for committing w., anything thereinbefore contained to the contrary thereof in anywise notwithstanding," the tenant for life made a lease under which the lessee was to some extent dispunishable for permissive w. by implication from the fact that the lessor

(c) See *Muskerry v. Chinnery* (1855), Ll. & G. temp. Talbot 182; *supra*, p. 147.

covenanted to do certain repairs. Baron Parke, in delivering the judgment of the Court on demurrer, said: "We conceive that there is no doubt of the liability of tenants for terms of years, for they are clearly put on the same footing as tenants for life, both as to voluntary and permissive w., by Lord Coke, though the degree of repairs required for a tenant from year to year, by modern decisions, is much limited. This being so, the covenant by the lessor to do the repairs implies an exemption of the lessee." This case seems quite consistent with the cases already mentioned, from which it appears that a tenant is obliged to do such repairs as will prevent the premises from decaying.

It is remarkable that the decision was expressly made under the first words of the restraining clause, and not under those prohibiting a lessee being made dispunishable for "committing w.," although if "*faciant vastum*" in the statute includes permissive w., it is difficult to see why "commit w." in a deed is not to have the same construction. To have so held would, however, have obliged the Court to differ from or follow the case of *Doe v. Bettison* (1810), 12 East 305, where a lease which impliedly allowed permissive w. was held validly granted under a power which excluded the giving of authority to commit w. It appears then, that Parke, B., avoided the necessity of differing from either Lord Coke or the Judges who decided *Doe v. Bettison*, by relying on the distinction of there being additional words which were not in the earlier case, but which, it is submitted, should not have affected the construction.

Where a lease under a power recites the power, it will only operate in so far as it is authorised by the power, except as between the donee of the power and the lessee,

when it may operate by estoppel. *Doe v. Ferrand* (1851), 20 L. J. C. P. 202; and see *Yellowly v. Gower*, u.s.

The case of *Nugent v. Cuthbert* (1822), Sugden's Law of Property 475, was decided on a power similar to that in *Yellowly v. Gower*, and on a lease under which the lessee covenanted to repair, casualties by fire and war excepted. The House of Lords upheld the lease on the ground that a tenant, though he may be liable for w., is not liable for casualties, which means events happening without the default of the tenant. This reverses the opinion of Lord Coke, who said: "If a house be discovered by tempest, the tenant must in convenient time repair it," Co. Lit. 53a, but this was only founded on the construction of a condition of re-entry in 12 Hen. 4, 5. See Broke, W. pl. 69, 22 Viner 449.

Where there are no restrictive words in the power, and the tenant for life, who is the donee of the power, is himself dispunishable for w., the remainderman has no right of action against the donee or the lessee, if the latter commits w. This follows from *Bray v. Tracy* (1625), W. Jones 51, quoted in Viner, W., where the tenant for life had no special power.

Yellowly v. Gower was intended to be followed by Kekewich, J., in *Davies v. D.* (1888), 38 Ch. D. 499, where a tenant by the curtesy, in exercise of the power conferred by the Settled Estates Act, 1877, 40 & 41 Vict. c. 18, demised an inn, the lessee covenanting to repair, "fair wear and tear and damage by tempest excepted." By s. 46 of the Act such a demise must not be made without impeachment of w. The learned Judge held that a tenant for years is liable for permissive w., and that consequently the exception in the lease was bad, as being in contravention of the statutory power. One of the cases

much relied on by Kekewich, J., was *Woodhouse v. Walker* (1880), 5 Q. B. D. 404, which came before a Divisional Court by way of appeal from the decision of a County Court Judge who held in favour of the defendant. A testator devised certain hereditaments to his wife for life, "she keeping the houses in repair," and, subject to this life estate, to the plaintiff in fee simple (he being called in judgment "the reversioner"). There is no doubt whatever that the defendant, the executor of the tenant for life, was liable to the extent of the assets on the implied contract (*d*), but the Court (Lush and Field, J.J.) proceeded further to hold that the life tenant committed a continuing tort by permitting the houses to be out of repair, and that a right of action against the executor was given by 3 & 4 Vict. c. 42, s. 2, a point which does not seem to have been argued fully and which was unnecessary to the success of the plaintiff. It is to be further observed that the decision of Kekewich, J., that a tenant for years is liable for fair wear and tear, is directly at variance with *Torriano v. Young* and other cases noted above, and the decision that he is liable for damage by tempest is opposed to the judgment of the House of Lords in *Nugent v. Cuthbert*, u.s. (and see "Accident").

Before leaving the subject of leases under powers, we should mention the case of *Doe v. Stephens* (1844), 6 Q. B. 208, where liberty to the tenant to pull down and use the materials in rebuilding was held not to conflict with the power which prohibited giving authority to commit w. or exempting the lessee from punishment for w. And see the chapter on "without impeachment," pp. 145-165.

By the Settled Land Act, 1890, s. 7 (Appendix), a tenant

(*d*) See *Batthyany v. Walford* (1887), 36 Ch. D. 269, and "legal personal representatives," in Index.

for life may make leases for twenty-one years "whereby the lessee is not exempted from punishment for w."

Accretion.—Where a lessee with a repairing covenant builds on the waste adjoining the premises in demise, with his landlord's consent, he holds the new house on the same terms. *White v. Wakley* (1858), 26 Beav. 17; cf. *Neale v. Parkin* (1794), 1 Esp. 229; *Whitmore v. Humphries* (1871), 7 C. P. 1.

Flats.—Apart from the custom of a particular place, the grantor of a lower chamber is not liable to the grantee for non-repair of the upper chambers or of the roof, cf. *Tennant v. Goldwin* (1705), 6 Modern at p. 314; but he is liable to the support of an upper chamber granted by him. *Harris v. Ryding* (1839), 5 M. & W. at p. 71. See Clode on the Law of Flats.

Ireland.—By the Landlord and Tenant (Ireland) Act, 1860, 23 & 24 Vict. c. 154, s. 42, "Every lease of lands or tenements made after the commencement of this Act shall (unless otherwise expressly provided by such lease) imply the following agreements on the part of the tenant for the time being, his heirs, executors, administrators, and assigns, with the landlord thereof; that is to say:

"1. That the tenant shall pay, when due, the rent reserved and all taxes and impositions payable by the tenant, and shall keep the premises in good and substantial repair and condition."

PERMISSIVE WASTE BY TENANTS FOR LIFE OTHER THAN LEASEHOLDERS.

Not within St. of Marlbridge.—These tenants were outside the Statute of Marlbridge. Thus Lord Coke says in 2 Inst. 145: "Here Fermarii do comprehend all such

as hold by lease for life, or lives, or for years, by deed or without deed. . . . This act extended not to tenant by the curtesy (see p. 3, *supra*), for he is not a farmer; but if a lease be made for life or years, he is a farmer, though no rent be reserved." So Fitz. N. B. 59, "The action of w. doth not lie but upon a lease made, or against tenant by the curtesy, or tenant in dower, or guardian."

But within the St. of Gloucester.—On the other hand there is no doubt that the Statute of Gloucester did apply to tenants other than leaseholders. Thus, *Manning v. M.* (1612), 2 Rolle Abr. 828, was a case in which the defendant was life tenant of one moiety and tenant in tail of another moiety under a will, and in respect of the former estate was liable. So Lord Coke says, in 2 Inst. 302: "He that hath an estate for life by conveyance at the Common Law, or by limitation of use, is a tenant within this statute. . . . An occupant is within this law (p. 301). . . . Albeit tenant in tail après possibility of issue extinct doth hold but for life, and so *within the letter of this law*, yet is he out of the meaning thereof in respect of the inheritance which was once in him, in respect whereof his estate is by law dispunishable of w., but his assignee shall be punished for w. by this statute," p. 302. See p. 159, *supra*.

This being the case it is rather remarkable that the Chancery cases have not as a rule been quoted at Common Law, and that the Common Law cases have not always been quoted in Equity, although both Courts were professing to act under the same statutes.

Not liable in Equity.—It will now be seen that Courts of Equity never imposed liability for permissive w. on this class of tenants, except in the case of *Parteriche v. Powlet* (1742), 2 Atk. 383.

The decision which has long been the leading authority on the point is that of *Powys v. Blagrove* (1854), 4 D. M. G. 448, where Cranworth, L.C., said, p. 458 : " This Court has always declined to interfere against mere permissive w., *Castlemain v. Craven*, 22 Viner 523. There the Master of the Rolls said : ' The Court never interposes in case of permissive w. either to prohibit or give satisfaction, as it does in case of wilful w.' On this ground, relief was refused in *Wood v. Gaynon*" (1760), Amb. 395, where the M.R. declined to make a precedent. So in *Lansdowne v. L.* (1820), 1 J. & W. 522; *Birch-Wolfe v. Birch* (1870), 9 Eq., at p. 692.

The case which has concluded the discussion in favour of the tenant for life is that of *In re Cartwright, Avis v. Newman* (1889), 41 Ch. D. 532. The legal life tenant under a will had allowed the buildings, gates, and fences on the devised land to fall into a dilapidated condition. Referring *inter alia* to *Yellowly v. Gower*, u.s., Kay, J., held : " Since the Statutes of Marlbridge and of Gloucester there must have been hundreds of thousands of tenants for life who have died leaving their estates in a condition of great dilapidation. Not once, so far as legal records go, have damages been recovered against the estate of a tenant for life on that ground. To ask me in that state of the authorities to hold that a tenant for life is liable for permissive w. to a remainderman is to my mind a proposition altogether startling." (e) This decision is in agreement with that of *Barnes v. Dowling* (1881), 44

(e) Some of the statements of law in the judgment appear inaccurate. Thus, it is obvious that the Statute of Marlbridge did not apply to a tenant under a will, see *supra*, p. 220; also *Gibson v. Wells*, 1 Bos. & P. (N. R.) 290, and *Herne v. Benbow*, 4

Taun. 764, are treated as decisions on tenancies for years, instead of at will. *Jones v. Hill*, 7 Taun. 392, is similarly treated, whereas the decision went entirely on the ground that the w. was not proved.

L. T. N. S. 809, where the tenant for life was sued for damages by a plaintiff, who appears to have been equitable tenant *pur autres vies* in remainder. Whatever his estate was, the Divisional Court held that the life tenant was not liable for permissive w. And see *Frith v. Cameron* (1871), 12 Eq. 169, where a tenant for life was held not liable to repair a house which was falling owing to the nature of the ground. See *infra*, p. 231.

Woodhouse v. Walker (1880), 5 Q. B. D. 404, has been discussed above, p. 219. It is to be observed that in the very recent case of *Dashwood v. Magniac* (1891), 3 Ch. 306, in which the representatives of a tenant for life were sued for permissive w. in allowing a lake to become foul, it was not even suggested by counsel or the Court that there was any obligation on the life tenant apart from the condition imposed of keeping in repair.

Blake v. Peters (1863), 1 D. J. S. 345, decided that a devisee of real estate with an executory devise over is not liable, but the cases cited above are more recent and forcible.

Miscellaneous. Pleading.—A declaration of voluntary w. will not support a proof of permissive w., *Martin v. Gilham* (1837), 7 Ad. & El. 540, 1 Nev. & P. 508; nor in an action of covenant declaring for permissive w. can the lessor recover for voluntary w., *Edge v. Pemberton* (1843), 12 M. & W. 187. This is of course subject to the present large and somewhat lax facilities for amendment.


Insurance Moneys.—A tenant for life, not being liable for damage by fire, if he insures a house and a fire ensues, is not bound to reinstate the premises, but he may keep the insurance money for his own use. *Warwicker v. Bretnall* (1882), 23 Ch. D. 188.

Notes.—If a life tenant will repair, he has the same

right as a lessee to resort to timber, gravel, &c., for the purpose. See p. 46, and *Bewick v. Whitfield* (1734), 3 P. Wms. 267.

Recoupment.—A tenant for life has no right to be recouped money laid out by him in repairs. *Hamer v. Tilsley* (1859), Johnson 486; and see p. 229.

Injunction v. Permissive W.—It should be noticed that in *Caldwall v. Baylis* (1817), 2 Mer. 408, an injunction was granted against permissive w.; but here the tenant for life held under a will, “he keeping the premises in tenantable repair,” and in addition, the property was of copyhold tenure, and so liable to forfeiture for permissive w. See p. 222 and “Copyholds.”



THE BURDEN OF REPAIRS.

The Duty of Trustees as to Repairs. *Under Special Powers.*
Repairs, when payable out of *Express Obligation to Repair on*
Corpus. *Beneficiary.*
Infants' Repairs.

THE question whether trustees are bound to keep premises in repair out of income depends on the wording of the instrument under which they hold, for they have no general power as against a limited owner to apply any part of the income, otherwise belonging to him, in repairs. One point for consideration is: Who has the right of physically possessing the property? For if the trustees have the right to exclude the life tenant, it is possible that they also have the right to maintain the premises out of the rents and profits. In general the trustees have no right to possession as against a tenant for life. *Denton v. D.* (1844), 7 Beav. 388.

In *Powys v. Blagrove* (1854), 4 D. M. G. 448, the words of the will directed the trustees after payment of "the expenses of keeping my said estate in repairs, &c., to pay the overplus rents and profits" to the tenant for life, after which estate the uses were legal. Lord Cranworth held that after the death of the tenant for life, at any rate, the right of possession in the trustees was intended to cease, and said: "This is quite inconsistent with the

notion of a trust to receive the rents and apply them in keeping the houses in repair." In the Court below, *Kay* 495, Page Wood, V.C., had said : "I can foresee no end to the demands which would be made upon trustees by remaindermen coming into possession of the trust property, who might think it not sufficiently repaired, if they might say to the trustees, 'it was your duty to look after the tenant for life, you had the legal estate, and it was your business to see that he was performing all these trusts; and as you have not done so we shall fix you with the liability.' I think that such a doctrine cannot possibly be established. There is, therefore, no authority for my interfering with the possession of this property."

In *Pugh v. Vaughan* (1850), 12 Beav. 517, Lord Langdale, M.R., had held that a direction to "pay the rents and profits" to the tenant for life, coupled with a gift over if he should "interrupt his trustees and executors in duly executing the trusts," showed that the trustees were intended to have the management of the devised property and the receipt of the rents. He offered to continue an injunction restraining the trustees from bringing ejectment upon the plaintiff, tenant for life, "undertaking to cut no more timber, and to permit the trustee to enter on the land, at all convenient times, to ascertain the state and condition thereof."

Although before the Settled Land Acts a tenant for life could not claim possession where large powers of management were vested in trustees, *Taylor v. T.* (1875), 20 Eq. 297, the Court might in its discretion admit him, *Bagot's Settlement* (1894), 1 Ch. 177, and the passing of the Settled Land Acts is an additional argument in his favour, *ib.* and *Wythes* (1892), 2 Ch. 369. He must give undertakings to insure, repair, cultivate, pay out-

goings, &c. Sex is no disqualification, *Newen* (1894), 2 Ch. 297.

Reinstatement payable out of Capital. When? — In *Harris v. Poyner* (1852), 1 Drew. 174, a testator bequeathed leaseholds specifically for life and over, without imposing any liability on the tenant for life beyond those contained in the covenant of the lease. It was held by Kindersley, V.C., that the dilapidations existing at the testator's death, being liabilities on his covenant, must be repaired at the cost of his residuary estate. The learned Judge distinguished this case where leaseholds were settled, from the case of a specific legacy of leaseholds, where as between the legatee and the residuary estate the legatee would be bound to bear the burden of the dilapidations. *Hickling v. Bowyer* (1851), 3 Mac. & G. 635. For another case of settled leaseholds see *Fitzwilliams v. Kelly* (1852), 10 Hare 266, where a similar result was arrived at to that in *Harris v. Poyner*; and see *Pinfold v. Shillingford* (1877), 46 L. J. Ch. 490, and consider *In re Baring, Jeune v. Baring* (1892), 151, *infra*, p. 229.

In the case of *In re Hotchkys* (1886), 32 Ch. D. 408, C. A., the Court held that the equitable tenant for life was not herself bound to repair property which devolved upon her, out of repair, under a will, but that it was the duty of the trustees, who had a power of sale in form of a discretionary trust, to keep the property in a saleable condition by applying the corpus of the settled property for that purpose. In this case the settled property consisted of two freehold estates, one very heavily incumbered, and of a small sum of debenture stock. Cotton, L.J., said, p. 417: "When the property has fallen into bad repair, the question will of course arise whether it

is worth while to do the repairs. It may be that where there is a devise of two estates, one subject to an incumbrance not made by the testator, and the other not incumbered, it may not be worth while to expend any money out of the unincumbered estate for the repairs of the incumbered one, for it would be throwing away money to repair the property if the circumstances were such that no one but the incumbrancer would be benefited by the expenditure."

A question closely allied to that just mentioned was raised in *In re Courtier* (1886), 34 Ch. D. 136, where the testator gave all his real and personal estate to trustees, one of whom was his wife, upon trust for his wife for life, and after her death for sale, with power to sell any of his short leaseholds. The greater part of the estate consisted of leaseholds, and those held for short terms were in a bad state of repair at the death of the testator. The trustees claimed that the widow was bound to reinstate these leaseholds so as to fulfil the covenants in the leases, and thereby exonerate the testator's estate; but the Court of Appeal held that she was under no such obligation. This action would probably never have been brought, if it had not been for the decision *In re Fowler* (1881), 16 Ch. D. 723, in which Fry, J., held that the trustees of leaseholds, settled by will with no mention of repairs, were entitled, pending the life-interest, to apply the rents in keeping the premises in repair for the purpose of satisfying the covenants in the leases and preserving the property for the remainderman. There were no cases cited in argument or referred to in the judgment, and the decision was distinguished in the case of *In re Courtier*, u.s., on the ground that it was not a case between tenant for life and remainderman, and that it was decided on a particular will. It is submitted, however, that the former decision

must now be treated as overruled. See *Macnolty v. Fitzherbert* (1858), 27 L. J. Ch. 272, *infra*, p. 232.

Again, where a testator bequeathed to trustees for several persons in succession a leasehold house, the term in which was perpetually renewable on payment of fines, under a lease which also contained covenants by the lessee to pay the rent, repair, and insure; it was held by Kekewich, J., that the rent and the necessary payments for repairs and insurance were payable out of the residuary estate, and that the fines and expenses of renewal were to be borne by the beneficiaries in proportion to their enjoyment, as ascertained by actuarial valuation. The learned Judge also held, on considering the terms of the will, that the income charges above mentioned were payable out of the income and not out of the capital of the residuary estate. *In re Baring, Jeune v. B.* (1893), 1 Ch. 61.

Recoupment.—Where, however, a limited owner has himself done the repairs, though not bound so to do, he will not in general be entitled to be recouped the expenditure, as it may be assumed to have been made, in part at least, from motives of self-interest. The case usually cited as the principal authority on this point is *Hibbert v. Cooke* (1824), 1 Sim. & St. 552, where the devisee for life of real estates was not allowed the expense incurred by her in repairing the mansion house which had been injured by dry-rot; Leach, V.C., “considering that it was an expense to which a tenant for life choosing to occupy a mansion house must submit.” This case was followed in *Dent v. D.* (1862), 30 Beav. 363, where the life tenant had rebuilt an old farmhouse, and buildings, and a row of cottages, and later again by *Leigh's Estate* (1871), 6 Ch. 887 (*infra*, p. 233), where James, L.J., said: “We cannot sanction the fund being expended in repaying the petitioner what he has already expended. This is

never done unless the expenditure was properly a charge upon the inheritance, for which there is no pretence here." The expense had been incurred in improving the mansion house. To the same effect was *Caldecott v. Brown* (1842), 3 Hare 144, and see *Nairn v. Marjoribanks* (1827), 3 Russ. 582; *Hamer v. Tilsley* (1859), Johnson 486; *Ormerod's S. E.* (1892), 2 Ch. 318. As to improvements, see Settled Land Act, 1882, s. 26, Appendix. For a case where a life tenant had power to charge the inheritance for repairs, see *Skinner v. Todd* (1881), 51 L. J. Ch. 198.

As to permanent improvements made by limited owners under mistake of title, &c., see *Neesom v. Clarkson* (1844), 4 Hare 97; *Mathias v. M.* (1858), 4 Jur. N. S. 780; *Horlock v. Smith* (1853), 17 Beav. 572; *Floyer v. Banks* (1869), 8 Eq. 115, &c.

Building Improvements for Letting.—In the recent case of *De Teissier's S. E.* (1893), 1 Ch. 153, Chitty, J., decided that s. 13, ss. 2 of the Settled Land Act, 1890 (Appendix), could only be invoked where the application was *bond fide* for the purpose of letting, and not where the life tenant intended to reside himself; and also, that the sum required could not be charged upon the estate of an infant remainderman unless it was a case of salvage, and then only where there was extreme danger to his interests, which in this instance were not seriously imperilled (a).

INFANT REMAINDERMAN—PRACTICE OF THE COURT.

Raising the Money.—There is now no doubt that in a proper case the Court may direct a sale of the whole of an infant's property, as in *Garmston v. Gaunt* (1845), 1 Coll. 577, where it was otherwise impossible to provide for the

(a) And see *Gaskell's S. E.* (1894), 1 Ch. 485.

renewal of the infant's leaseholds for lives (*b*); but in general only a mortgage, or a sale of part of the property, will be directed (*c*).

Benefit of the Infant.—*Frith v. Cameron* (1871), 12 Eq. 169, was a case of settlement in which a residential estate of small extent was settled upon trust (in effect) for the settlor's widow for life, remainder to his daughter for life, with remainder in tail to infants. There was no liability on the widow to repair. The house, which was built upon a rubbly soil, was giving way, and it was proposed to mortgage the freehold for the purpose of paying for the prospective erection of a new house on a fresh site, and this Malins, V.C., sanctioned "under the general jurisdiction of the Court," declaring it for the benefit of the infant remainderman. There was a power of sale and exchange, but not of mortgage. Thus, in the case of *In re Davis* (1858), 3 De G. & J. 144, a tenant for life was recouped out of money paid into Court under the L.C.C. Act, 1845, for the expense which she had incurred in rebuilding a house, condemned under the Metropolitan Buildings Act (see *infra*, p. 233). But on the other hand in *Brunskill v. Caird* (1873), 16 Eq. 493, where land was strictly settled to legal uses, and there was a direction to apply accumulations during any minority in purchase of more land, Selborne, L.C., refused to allow any portion of the accumulations to be laid out in repairs, which apparently were of an ordinary character. See *Dunne v. D.* (1855), 7 D. M. G. 207, where the C.A. refused to

(*b*) But see *Calvert v. Godfrey* (1843), 6 Beav. 97. The Court will not direct a sale merely because it will be for the infant's benefit.

(*c*) A mortgage for repairs will not be allowed in a creditor's action under 2 & 3 Vict. c. 60, s. 1, where power is given to mortgage infants'

realty for payment of the debts of the deceased, to which the infant heirs and devisees are liable. A mortgage of an infant's property may contain a power of sale. *Selby v. Cooling* (1857), 23 Beav. 418. A power of sale is conferred by the Conveyancing Act, 1881, s. 19.

sanction the building of a new wing under a power to invest in land, and *De Teissier's S. E.*, *supra*, p. 230. In *Griggs v. Gibson* (1873), 21 W. R. 818, C. A., both rebuilding and furnishing were allowed, the latter out of accumulations.

In *Macnolty v. Fitzherbert* (1858), 27 L. J. Ch. 272, permanent repairs in restoring farm buildings, left dilapidated by the testator, were allowed out of capital moneys settled on the same trusts.

In *re Jackson* (1882), 21 Ch. D. 786, was a case where an infant was entitled as heir at law to part of a deceased's realty and also to a possible surplus of the devised realty, as to which there were certain existing trusts, not named in the report. It was proposed to mortgage the devised real estate in order to raise money to pay for intended repairs on the same property; but there were no powers of sale or mortgage conferred by the will. Kay, J., said: "I will direct an inquiry whether any and what repairs of houses which are part of the infant's property are absolutely necessary to be done. I think this jurisdiction should be jealously exercised, and only in cases which amount to salvage." See *Fazakerley v. Culshaw* (1871), 24 L. T. 773, as to interest, and *Bridge v. Brown* (1843), 2 Y. & C. 181.

The case of *In re Household* (1884), 27 Ch. D. 553, further illustrates this principle. A testator devised and bequeathed his real estate upon trust for R. H. Household for life, remainder to infants in fee simple. The residuary personal estate was settled upon corresponding trusts. Part of the real estate consisted of a farm, which two years after the testator's death became vacant and was unlet. The tenant for life under the will was willing to cultivate if he could have an advance of £1,000 towards the expense of stocking, cultivating, &c., out of the residuary personalty, he becoming personally responsible for the repay-

ment. This was sanctioned by Bacon, V.C., upon evidence that the arrangement was for the benefit of the infant remaindermen.

The last case is that of *Conway v. Fenton* (1888), 40 Ch. D. 512, where Kekewich, J., authorised the trustees of two marriage settlements, each settlement being of one moiety of certain real estate and of a substantial amount of personalty, to advance sufficient money from the personal estate to pay for such repairs as upon inquiry should be shown to be necessary to preserve the settled real estate. In each case there was a trust for sale and re-investment, and in one settlement there was a power to invest in real estate. The learned Judge commented upon the fact that in no case cited to the Court had the question been argued whether the Court had jurisdiction to authorise contemplated expenditure, as it certainly had to repay past beneficial outlay; but the Court has now assumed jurisdiction in so many cases that it is safe to conclude that its practice will not be reversed.

UNDER SPECIAL POWERS.

L.C.C. Act, 1845.—*In re Leigh's Estate* (1871), 6 Ch. 887, was an application by a tenant for life, without impeachment of w., for the reinvestment of purchase money, paid into Court under the L.C.C. Act, 1845, partly in a proposed new roof to the mansion house and in new farm buildings, and the rebuilding of a dilapidated public-house. The remaindermen, some of whom were infants, objected to all the expenditure, except that on building or rebuilding cottages and farm buildings. This the Court allowed as a permanent augmentation of the property, but refused all else, James, L.J., saying: "But the Court will not do that if the remaindermen object;

therefore the rebuilding of the public-house cannot be sanctioned. And we cannot sanction the proposed outlay on the repairs and alterations on the mansion house, or on repairs generally on other parts of the estate. It is the duty of the tenant for life to keep up the buildings, although he may be by law punishable for w."

The case of *Aldred* (1882), 21 Ch. D. 228, was peculiar in its circumstances and should not perhaps be pressed too far. The tenant for life of two-thirds of the net rents of a copyhold house and of two leasehold houses petitioned for payment of the cost of repairing the copyhold house out of the purchase money of the leaseholds, which at the time of the purchase had only ten years to run. North, J., allowed the petition, professing to follow *Leigh's Estate* (u.s.); but the largeness of the interest of the tenant for life in the short term of the leaseholds must have influenced the decision, being insisted on in argument.

Private Act or Settlement.—The next case was *Drake v. Trefusis* (1875), 10 Ch. 364. Lord Rolle had left a will by which he directed the surplus income of his residuary real and personal estates to be invested in land, and by a private Act powers of sale and exchange and reinvestment in land were conferred on the trustees. The life tenant desired that a certain sum should be expended by the trustees in partly rebuilding the mansion house, which was burnt down after the testator's death, and in rebuilding and repairing farm buildings, which had also fallen into disrepair since the death. James, L.J., said: "In my judgment there is less difficulty in acceding to an application of this description where the money arises under the trusts of a will or settlement, or, which is the same thing, under a private Act of Parliament, and is dealt with under the ordinary jurisdiction of the Court, than where it arises under the provisions

of a public Act of Parliament, which prescribes the mode of applying it. . . . We never intended, however, to go further than this, that the expending money in building a house on a vacant piece of ground forming part of the settled property is in substance the same thing as buying a house, and that the money to be invested in the purchase of real estate may therefore be properly applied in the erection of new buildings. Repairs and permanent improvements do not come within this principle. I am, therefore, of opinion that the proposed expenditure in reinstating the mansion cannot be sanctioned, nor any outlay in permanent improvements which do not put new buildings on the ground." See *Davis*, p. 231, and *Newman's S. E.* (1874), 9 Ch. 681, where all the previous decisions were cited, *Ex p. Rector of Claypole* (1873), 16 Eq. 574; *Brunskill v. Caird*, ib. 493; *Leslie's S. T.* (1876), 2 Ch. D. 185; *Speer's Trusts* (1876), 3 Ch. D. 262; *Donaldson v. D.*, ib. 743. In *Bowes v. Strathmore* (1843), 8 Jur. 92, were special powers of administration.

In *Nether Stowey Vicarage* (1873), 17 Eq. 156, Jessel, M.R., refused to sanction the application of the surplus of a Land Tax Redemption fund to repay a vicar the expense of repairing the vicarage house and increasing the accommodation. And see 49 & 50 Vict. c. 54, s. 6 (1886).

Ireland.—By 10 & 11 Vict. c. 46, trustees of money liable to be laid out in land may execute improvements with the sanction of the Court of Chancery, and a limited owner of such improvements is impeachable of w. S. 6 (1847).

GENERALLY.

Apart from the Settled Land Act, 1882, s. 33 (Appendix), trustees have no power to apply capital in repairs or

improvements, *Bostock v. Blakeney* (1789), 2 Bro. C. C. 653, Thurlow, L.C., but capital may rightly be expended—

(1) Where it is laid out in the nature of salvage, as in *Ferguson v. F.* (1885), 17 L. R. Ir. 552, C. A. (d) (distinguishing *Gillibrand v. Crawford* (1869), 4 Ir. R. Eq. 35, & *Dent v. D.* (1862), 30 Beav. 363); *Pearson's Trusts* (1873), 21 W. R. 401.

(2) Where the money is liable to be invested in land, and it is desired to erect new buildings or rebuild dilapidated houses, as in *Leigh's Estate* and *Drake v. Trefusis*, u.s.; *Hotham's Trusts* (1871), 12 Eq. 76; *Jesse v. Lloyd* (1883), 48 L. T. 656; *Barrington's Settlement* (1860), 1 J. & H. 142.

(3) Where a trustee has *bond fide* improved an estate with capital, a beneficiary can only get an order against him on allowing him to take to the improved estate if he wishes. *Vyse v. Foster* (1874), 7 H. L. 318; *Jesse v. Lloyd*, u.s.

EXPRESS OBLIGATION TO REPAIR ON BENEFICIARY.

The acceptance of a gift, whether conferred *inter vivos* or by will, necessitates the performance by the acceptor of the conditions attached to the gift. But such a gift does not raise a trust in the donee, and therefore the remedies for breach of trust cannot be pursued. *Kingham v. Lee* (1846), 15 Sim. 396, per Shadwell, V.C.

Blake v. Peters (1863), 1 D. J. S. 345, before the Lords Justices, was a strong case, in which a devisee in fee with an executory gift over subject to a condition "that the said [devisee] shall from time to time during his life keep my leasehold and copyhold estates fully estated with three lives," was held personally liable for the fines on renewals.

(d) Q.v. as to liability of life tenant, instigating expenditure, and as to his recoupment.

One of the clearest cases for reference is that of *Skingley*, a lunatic (1851), 3 Mac. & G. 221. This was a petition by the committee of Skingley's estate asking that a mansion house which had been burnt down should be rebuilt at the expense of the lunatic's estate. Skingley was tenant for life under his father's will of the mansion house and estate, "he committing no manner of w. and keeping the same messuage and premises in good and tenantable repair." Lord Chancellor Truro held "that the correct construction of the words of this will creates an obligation upon the tenant for life to rebuild the premises which have been destroyed by accidental fire."

This was followed by *Gregg v. Coates* (1856), 23 Beav. 33, which is perhaps the most important case on this branch of the law. There, a testator devised a mill to trustees, but declared that they should allow the defendant to occupy the same, "so long as he should think proper so to do, he nevertheless keeping the same . . . in good and tenantable repair, &c." The defendant occupied until the premises were burnt down on 1st April, 1854. Romilly, M.R., said: "I am of opinion that this must be treated as an implied contract, entered into by the person who accepts the estate. . . . It has been suggested, that the non-performance of the condition does nothing more than put an end to term. I think that is not so." And he held that the fire did not *ipso facto* determine the occupation.

In *Dashwood v. Magniac* (1891), 3 Ch. 306 (e), a testator devised his estates upon trust for his wife for

(e) For other instances of a devise *cum onere*, see *Messenger v. Andrews* (1828), 4 Russ. 478; *Rees v. Engelback* (1871), 12 Eq. 225, &c. Where two estates are given by the same instrument, one *cum onere* and the

other not, it is a question of construction whether the devisee can take the one without the other. *Warren v. Rudall* (1860), 1 J. & H. 1; *Hotchkys* (1886), 32 Ch. D. 408, and cases there cited.

life, upon condition that she should keep in repair the mansion house and "the outbuildings, parks, grounds, fences, gates, and appurtenances thereto belonging, in good and substantial repair, order, and condition." In the action a claim was made against her representatives for the estimated cost of cleansing an ornamental lake which had been allowed to become foul, partly at any rate in the tenancy of the widow, but Chitty, J., held that the condition did not apply to cleansing, &c., the lake, or the liability would have been specially mentioned, as was that regarding the fences and gates; but that the life tenant was bound to keep the banks and sluices in good repair.

A direction that a devisee for life should forfeit the estate "should he neglect to keep in complete repair the column now being erected," will not oblige the devisee, on pain of forfeiture, to complete the erection, *Jolliffe v. Twyford* (1858), 26 Beav. 227, but only to keep it in the same repair as at the time of the testator's death. An incomplete building may be finished at the cost of the estate on which it is being erected. *Hibbert v. Cooke* (1824), 1 S. & S. 552, followed in *Dent v. D.* (1862), 30 Beav. 363. See *Harris v. Poyner*, p. 227.

Liability imposed on Trustees out of Income.—Where, however, there is a devise to trustees upon trust "out of the rents and profits to keep up the mansion house and all other buildings and messuages in good repair, rebuilding, if necessary, any farming buildings that may from time to time require it," and subject thereto in trust for a tenant for life, &c. (*f*), Kindersley, V.C., said in *Cooke v. Cholmondeley* (1858), 4 Dr. 326, the buildings "must be put in such a state of repair as will satisfy a

(*f*) Cf. *Kinnersley v. Williamson* (1870), 39 L. J. Ch. 788, a tenant for life in remainder has no equity to compel the tenant to put premises in repair, where the limitations are legal.

respectable occupant using them fairly ; but not in that state of repair which an owner or tenant might fancy. . . . As to the form of the suggestions to be given to the surveyor, they must be as follows :

“There must be no rebuilding of the mansion or any other of the buildings, except farming buildings, without consent. In rebuilding or repairing, regard must be had to the nature and character of the buildings ; and this must be kept in view, to keep them of the same nature and character as before, and of the same materials, and nothing must be done which can improve them beyond what they were originally. Regard must also be had to what are the funds in hand, and the surveyor must consider, having that in view, what buildings should be repaired at once, and what will be the expense of so doing, and what repairs should be postponed till further funds are available.”

The next case was *Crowe v. Crisford* (1853), 17 Beav. 507, in which *Cooke v. Cholmondeley* was not cited. The whole real and personal estate was devised and bequeathed to trustees, who were “out of the rents, issues, and profits” to keep all the houses and buildings “in good and substantial and tenantable repair.” Some of the leaseholds, which were settled in specie, were out of repair at the testator’s death. Romilly, M.R., held that ordinary repair to them must be paid out of the income, but “not such extraordinary repairs as would be equivalent to rebuilding the house.” The words of the judgment in inverted commas do not seem to have been necessary to the decision of the case, and are probably not law in view of other decisions. See pp. 240, 272.

On Life Tenant out of Income.—*Re Bradbrook, Lock v. Willis* (1887), 56 L. T. 106, went further than the last case, as there was no direction to repair “out of the

rents and profits," but merely a devise to a testator's wife for life of certain houses with their buildings, lands, and appurtenances, "she keeping the same in good and tenantable repair." At the time of the testator's death the outbuildings, being greenhouses and conservatories, were in complete disrepair, and there was evidence that the testator did not intend to keep them up, having no use for them. But Kay, J., held that the tenant for life ought to have repaired them, and decreed that her representatives should pay the sum which was reasonably necessary to put the premises in the state of repair in which the tenant for life ought to have left them; the measure of damages was laid down in *Woodhouse v. Walker* (1880), 5 Q. B. D. 404; and see *Joyner v. Weeks* (1891), 2 Q. B. 31, a case on a covenant to repair where Esher, M.R., said: "The rule is that, when there is a lease with a covenant to leave the premises in repair at the end of the term, and such covenant is broken, the lessee must pay what the lessor proves to be a reasonable and proper amount for putting the premises into the state of repair in which they ought to have been left." See p. 244.

On Trustees out of Income.—Where similar directions are given in a case in which a tenant for life is only interested in part of the estates, it may operate greatly to his advantage, instead of being a burden upon him. Thus in *Lethbridge v. L.* (1861), 3 D. F. J. 523, where large estates were given to trustees upon trust (inter alia) to repair and improve any of the messuages, buildings, lands, and hereditaments, fixtures, furniture, and effects, and "generally to make such expenditure in the amelioration and improvement of the trust estate during the continuance of the trusts thereby created, as the trustees for the time being should think proper or expedient," and, if

they should think proper, to permit [the petitioner] "to occupy the mansion house, garden, and premises, without paying any rent or compensation for the same, and without . . . being obliged at his expense to keep the same in repair, or being at any other expense than paying the rates and taxes." The Lords Justices held that these words were sufficient to throw upon the estate given to the trustees not only the burthen of keeping a vinery and force-pits in repair, but "also the burthen of furnishing the gardens with any plants, shrubs, or trees, which in the judgment of the trustees may be necessary for keeping up the same," and that the petitioner was entitled to occupy the surrounding park. But see *Colyer, infra*, p. 272. And see *Lombe v. Stoughton* (1849), 17 Sim. 84, as to an implied power to lay out gardens, &c.

Miscellanea. Liability of Estate of Deceased Tenant.—

This express liability for permissive w. may be enforced against the estate of the tenant after his death, it being a debt arising *quasi ex contractu*. *Batthyany v. Walford* (1887), 36 Ch. D. 269, where a liability in regard to foreign land was enforced in a creditor's action in England. And see *Woodhouse v. Walker* (1880), 5 Q. B. D. 404, which, however, is subject to the criticism, *supra*, p. 219.

Injunction.—In *Caldwall v. Baylis* (1817), 2 Mer. 408, where a devise was made to the defendant, "he keeping the buildings in tenantable repair," an injunction was granted to restrain permissive w. This case was distinguished in *Powys v. Blagrove* (1854), 4 D. M. G. 448. See p. 222.

Reversioner Renewing Leaseholds and Repairing.—In *Marsh v. Wells* (1824), 2 S. & S. 87, a reversioner who had renewed leaseholds with the privity of the tenant for

life, and had likewise covenanted to repair, was held entitled to an indemnity from the estate of the latter for the expense of repairing dilapidations occurring in his lifetime.

The Thellusson Act.—An important question arose in *Vine v. Raleigh* (1891), 2 Ch. 13, under the Thellusson Act (39 & 40 Geo. 3, c. 98), as to whether a trust to apply surplus income “in the improvement of the landed estate and in maintaining in good habitable repair houses and tenements on the property,” was void as an accumulation beyond the period allowed by the Act. The Court of Appeal said, per Lindley, L.J.: “All improvements in substance, which can in any fair sense be regarded as coming under the words ‘maintaining in good habitable repair houses and tenements,’ appear to be outside the Thellusson Act altogether. . . . There may be building land on the estate; money laid out in building houses on that land would be within the Act.”

Locke King's Act, &c.—17 & 18 Vict. c. 113; 30 & 31 Vict. c. 69; 40 & 41 Vict. c. 34, only apply to an interest in land or hereditaments charged with a mortgage debt.

Compensation to Agricultural Tenants.—The liability to compensate an agricultural tenant for improvements, tillages, manures, &c., is a liability attaching to the person in receipt of the rents and profits, so that a tenant for life takes the land subject to that burden, and he has no right over against mortgagees, or trustees in their position, who are not in possession. *Mansel v. Norton* (1883), 22 Ch. D. 769, C. A.

LANDLORD AND TENANT.

(See also under special heads.)

Landlord's Rights. Trees.—Where a man leases a wood which is only great trees, the lessee cannot cut it, but shall have only the grain (Broke, W. pl. 126), and shade and herbage (8 Bacon 393). These rights prevent the lord from entering and cutting down during the tenancy unless he has reserved the trees. Thus it is said in *Mervyn v. Lyds* (1553), Dyer 90 *a*: "The woods and trees are parcel of a lease and pass to the lessee as well as the land, if they are not excepted by it; and, in proof of this, all fruits and profits arising from the fruit trees shall be the lessee's, and the shadow, and also the branches and loppings for fuel, or inclosure of fences; and although it would be a good bar in w. for the lessee to say that his lessor, who is the plaintiff, did the w., yet if the lessor cut down the trees without the licence or against the will of the lessee, an action of trespass well lies against him by the lessee." In *Liford's Case* (1615), 11 Coke 46 *b*, it was resolved "that when no exception is in the lease of the trees, the lessee has such particular interest in the tree as aforesaid (fruit, mast, shade, loppings, &c.), and the inheritance of the trees is in the lessor." And in accord

with this is *Anon.* (1550) Moore, No. 23, p. 6, where it is said that if the lessor cuts down a tree and carries it away, the lessee shall have an action of trespass. See *Herlakenden's Case* (1589), 4 Coke 62 *a*, and numerous others.

Damages, Measure of.—In an action of w. the measure of damages is the value of the injury done to the reversion, less discount for immediate payment: *Whitham v. Kershaw* (1885), 16 Q. B. D. 613, C. A., where the headnote is somewhat misleading, as there was no covenant against w., though the damages would in either case be the same. In an action for wrongful conversion, which was an alternative remedy in this case, as the defendant had removed and appropriated part of the soil of the tenement, the damage would be the value of the chattel at the time of severance, *ib.* 618. And see *Bubb v. Yelverton* (1870), 10 Eq. 465. But in an action on a covenant to deliver up in repair, which cannot be brought until the end of the term, the measure of damages is the cost of fulfilling the covenant by putting the premises into the state required. *Joyner v. Weeks* (1891), 2 Q. B. 31; *Henderson v. Thorn* (1893), 2 Q. B. 164; see *supra*, p. 240.

Right of Entry. Trees Excepted.—Where the trees are excepted from the demise, the lessor can by the Common Law enter to fell and carry away. 1 Wms. Saunders 567 n. He has all the benefits of the trees, and “the young of all birds that breed in the trees, and the fruits.” *Liford's Case* (1615), 11 Coke 46 *b*, “It was resolved . . . that when the lessor excepted trees, and afterwards had an intention to sell them, the law gave him and them who would buy, power as incident to the exception, to enter and show the trees to those who would have them; for without sight none would buy, and without entry they

could not see them. . . . If I grant you my trees in my wood, you may come with carts over my land to carry the wood." (And see *Foster v. Spooner* (1583), Cro. Eliz. 17.) This was followed in *Hewitt v. Isham* (1851), 7 Exch. 77 (Ex. Ch.), where a parol reservation of trees, &c., from a parol lease was construed as a licence, Parke, B., saying: "Wherever trees are excepted from a demise, there is by implication a right in the landlord to enter the land and cut the trees at all reasonable times. If indeed he leaves them on the land for an unreasonable time, he does more than the law authorises him to do."

Trees Injured by Stranger.—Where trees are not excepted, both lessor and lessee can bring an action for injury to their respective interests in trees cut or injured by a stranger. *Bedingfield v. Onslow* (1685), 3 Levinz 209.

Entry on House.—A reversioner in fee may enter a house in possession of a tenant for years to see if any w. has been committed, if there is any defect in the reparations, and if prevented may bring an action for damages. *Hunt v. Dorman* (1618), Cro. Jac. 478.

A condition of re-entry on doing any w. applies to "suffering houses to be wasted." 2 Inst. 145; qu. by a stranger, see "Permissive W."

A lessor cannot eject for non-fulfilment of contract when his own prior covenants are unfulfilled. *Doe v. Morris* (1809), 2 Taun. 52.

By the Landlord and Tenant (Ireland) Act, 1860 (23 & 24 Vict. c. 154), s. 38, "It shall be lawful for the landlord of any premises holden under lease or other contract of tenancy made on or after the first day of January, one thousand eight hundred and sixty-one, upon which any w., misuser, or destruction shall have been

committed or suffered, and his agent lawfully authorised, at any reasonable time to enter upon the premises so wasted or misused, and to inspect and, if necessary, to survey the same for the purpose of ascertaining the nature and extent of any w. or injury done, or the quantity of land burned contrary to the provisions of this Act; and if any person shall hinder or obstruct such landlord or agent in making such entry, inspection, or survey, he shall forfeit to the said landlord a sum not exceeding ten pounds, to be recovered by civil bill action in the same manner and with the like appeal as in ordinary cases of civil bill actions." See p. 254.

Covenant to Repair. Breach.—Then there are the cases which rest upon the specific covenant to repair, as *Elliot v. Watkins* (1835), 1 Jones Ex. 308, where there was a covenant to maintain the premises "and all improvements" in good tenantable order. The tenant converted a shop and dwelling-house into a store, and the jury finding for the defendant, the Court ordered a new trial, although the value of the premises had been increased. So in *London (Mayor, &c.) v. Hedges* (1810), 18 Vesey 355, the Court granted an injunction to restrain pulling down and removal of materials shortly before the end of the term. In *Bonnett v. Sadler* (1808), 14 Vesey 526, Eldon, L.C., restrained the tenant under an agreement for a lease from altering a private house into a coach-builder's loft, &c., as the defendant had made fraudulent representations, and the alterations would be inconsistent with the usual covenant to repair.

Remedies.—A covenant to yield up the premises, &c., does not preclude an action for w. committed during the term, though the term had expired at the time of action brought, and though an action on the covenant would also

lie. *Kinlyside v. Thornton* (1776), 2 W. Bl. 1111; followed in *Marker v. Kenrick* (1853), 13 C. B. 188, where a boundary barrier of a mine had been removed. If the covenant is against the commission of w., the covenantor, sued on the covenant, is only liable for that which would be w. if there were no stipulation respecting it: *Jones v. Hill* (1817), 7 Taun. 392. But where the lessor sues in w. and not in covenant, the lessee may rely on defences not available in an action on covenant (and vice versa), e.g., that he cut trees for the purpose of repairing. "The law would be the same, if the lessor had been bound by the covenant that he should repair the house, &c., and did not do it, but the lessee had done it, and cut the trees for it as above, he is justifiable." Dyer 198 *b* (1561). The lessor should have sued on his covenant. Co. Lit. 54 *b* says that the lessee may repair with the timber growing upon the ground, though he be not compellable. And see under "Botes," p. 47.

Construction of Covenants, &c. — In *Doe v. Price* (1849), 8 C. B. 894, there was a demise of land and quarries with liberty to open and work the latter on payment of a royalty, reserving all trees, underwood, &c., with a covenant not to commit w. in cutting trees, &c. This covenant does not extend to prevent the lessee from felling trees necessary to remove for the purpose of opening and working the quarries; though it does extend to what would be analogous to w., viz., destruction of other trees, &c., excepted from the demise.

A covenant to deliver up all trees standing, &c., "whole and undefaced, reasonable use and wear only excepted," is not broken by removing trees past bearing from an overcrowded orchard. *Doe v. Crouch* (1810), 2 Camp. 449. But a lessee who covenants not to remove

or grub up breaks his covenant if he remove trees from one part of the premises to another, and if he take away any trees, unless they be dead. *Doe v. Bird* (1833), 6 C. & P. 195.

See *Love v. Pares* (1810), 13 East 80, for a covenant by the lessor to pay for all coppice of less than ten years' growth; *Goodtitle v. Saville* (1812), 16 East 87, for clause reserving liberty to tenant to cut timber, &c., with right of pre-emption in the lessor; *Snell v. S.* (1825), 4 B. & C. 741, for covenant to deliver timber growing on the premises for repairs, which is only effective so far as sufficient and proper timber exists there.

In *Nicholson v. Rowe* (1859), 4 De G. & J. 10, C. A., a lease was made of a dwelling-house with grounds and ornamental water, "and also the control of the plantation on the opposite side of the water for the purpose of preventing trespassers thereon, but so as not to interfere with the persons employed by" the landlord. The plantation was included in a marginal plan. The Court granted an injunction to prevent the lessor cutting down and grubbing up the plantation, which was of larch and ash, considering it sufficiently clear that it was to be preserved for the benefit of the dwelling-house.

Warranty of Fitness.—The lessors demised a warehouse *eo nomine*, and covenanted to do substantial repairs. Damage was caused by reasonable storage of grain. Fry, J., said at p. 821: "If it were necessary for me to determine the point, I should be prepared to hold that no user of a tenement which is reasonable and proper, having regard to the class to which it belongs, is w.," and held that the lessor was bound to repair the warehouse, if it was bad when the lessee took it: *Saner v. Bilton* (1878), 7 Ch. D. 815. The lessors would also be bound to rebuild

upon the premises falling down through reasonable use : *Manchester Bonded, &c. v. Carr* (1880), 5 C. P. D. 507. In this case a strong Divisional Court held on questions of law submitted to them, as follows : "It was contended that he was liable for w. and destruction, and it was argued that whenever a tenant actually destroys the property demised he must restore it or compensate his landlord for its loss, unless, of course, in cases where destruction is contemplated, as in mines and quarries. We have no doubt that this contention is well founded where the destruction is wilful or negligent ; but there is no authority to show that it applies to destruction by using the property demised in what was apparently a reasonable and proper manner, having regard to its character and to the purposes for which it was intended to be used. On the other hand, this very question had to be considered by Mr. Justice Fry in *Saner v. Bilton*, 7 Ch. D. 815, and he came to the conclusion that in such a case the tenant was not liable for the destruction of the property. The question in these cases is whether it is the tenant's duty to ascertain what he can do with safety to the property, or whether he is not entitled to assume that it is fit to be used for the purposes for which it is let and for which it is apparently fit. We are of opinion that the latter is the true view, and that, in the absence of an express agreement to that effect, a tenant is not liable for the destruction of the property let to him if such destruction is in fact due to nothing more than a reasonable use of the property, and any use of it is in our opinion reasonable provided it is for a purpose for which the property was intended to be used, and provided the mode and extent of the user was apparently proper, having regard to the nature of the property, and to what the tenant

knew of it, and to what as an ordinary business man he ought to have known of it. To hold a tenant liable for the destruction of the property by its reasonable use as above explained, would be to hold him liable for latent faults and defects in the property demised. We are of opinion that he is not liable for such faults and defects, in the absence of express agreement on his part imposing such liability upon him. We are, however, of opinion that *primâ facie* a tenant is bound to restore the property demised to him, and that if such property is destroyed by the acts of himself or his under tenants, the presumption is against him, and he must in order to exonerate himself show that the destruction was owing to causes for which he was not responsible." It was further held, however, that the lessors were not liable on any implied warranty of fitness, as none such exists in law, except as to houses let furnished. See "Permissive W.", p. 211.

Accidental W.—A tenant is not responsible for accidental damage, where negligence is negatived. Thus in *White v. McCann* (1851), 1 Ir. C. L. R. 205, the jury found that the fire which occasioned the destruction was accidental, and therefore there was no breach of duty. Blackburn, C.J., at p. 217 said: "There is no authority or position that the accidental destruction of premises amounts to permissive w., or to a tort on the part of a tenant. In Co. Lit. 53 is this passage: 'Burning the house by negligence or mischance is w.' I should strongly infer from this that burning the house, if not by negligence, is not w.; and this view of it is confirmed by Lord Coke, citing in a subsequent part of the same page the passage from Fleta which has been so much observed on: 'Fortuna autem et ignis vel hujusmodi eventus inopinati omnes tenentes excusant.' Mr. Hargreave appears by his

note to treat both these positions, as they plainly are, in *pari materia*, and the result is that negligence is the cause of the tenant's liability, and that mere accident does not make him constructively guilty of permitting or suffering the premises to be consumed by fire. I would draw the same conclusion from the words of the Statute of Marlbridge, '*non faciant vastum*'; and the exposition of these in 2 Inst. 145: . . . All these passages and phrases point to the omission of acts which it was the tenant's duty to do, and which wrongful omission causes the injury complained of. They therefore seem to be quite at variance with the notion, that where the injury is the sole result of accident, and there is no neglect of duty, the *w.* can be permissive." (a) See, too, p. 211, *supra*.

And as to immunity from accidental injury, see Britton, fol. 168.

"If a house is thrown down by a great wind, this is not *w.*; so if apple trees are uprooted, it is not *w.* if the lessee afterwards cuts them; so if a house is abated by lightning." Co. Lit. 53 *b*; 2 Rolle Abr. 820; Bacon, W. (E). Each authority, the later copying from the earlier, proceeds to say that a lessee who well repairs sea or river banks is not responsible for tempest or unusual floods. See *supra*, p. 213. *Nugent v. Cuthbert*, p. 218.

No person is now liable in England for accidental fire, except under a contract to that effect between landlord and tenant. 6 Anne, c. 31; 14 Geo. 3, c. 78, s. 86.

Injury to Sporting Rights.—A landowner who has let the shooting over his estate is not thereby precluded from cutting timber or coppice in the ordinary and proper course of management. "The right of shooting is a right

(a) All tenants are excluded from the benefit of the Irish Act as to accidental fire, 2 Geo. 1, c. 5.

to shoot over the lands as the lands may happen to be at the time, the landlord, of course, not doing anything for the express purpose of injuring the right of shooting." There was evidence that the trees required cutting *Gearns v. Baker* (1875), 10 Ch. 355, before James and Mellish, L.J.J.

In the previous case of *Pattison v. Gilford* (1874), 18 Eq. 259, Jessel, M.R., had refused an injunction to restrain interference with the right of shooting by making a road, severing two hedges for that purpose, and selling the land in lots as building land, though with notice of the shooting lease. He said: "I should hesitate long before I granted an injunction against a defendant, over whose estate there existed a right of shooting, to prevent his building a single house. Of course a great deal would depend on the extent of the property, and the nature of the coverts, and so on; but I should require to be satisfied, according to the authorities, that by the erection of a house, or even two houses if the estate was a large one, injury must necessarily and inevitably follow. When I say inevitably, I do not use the word in the sense of there being no possibility the other way, because I think Courts of Justice must always act upon the theory of very great probability being sufficient;—all I mean is that there must be such a great probability, that in the view of ordinary men, using ordinary sense, the injury would follow. But in this case the defendant is not going to do anything of the kind; all he is going to do is what he has an undoubted right to do, to sell the estate."

And see "*Profit à Prendre*", p. 336.

Where there is a covenant for quiet enjoyment, whether expressed or implied, as in a lease under the Conveyancing Act, 1881, the landowner will be restrained

from acts which interfere. Such a covenant is not imported by the Act into a mere licence.

Agricultural Holdings Act, 1883.—By the Agricultural Holdings Act, 1883, a tenant who executes the following improvements with the previous written consent of his landlord is entitled to compensation at the end of the tenancy: Sch. I. (1) Erection or enlargement of buildings; (2) formation of silos; (3) laying down of permanent pasture; (4) making and planting of osier beds; (5) making of water meadows or works of irrigation; (6) making of gardens; (7) making or improving of roads or bridges; (8) making or improving of watercourses, ponds, wells, or reservoirs, or of works for the application of water power or for supply of water for agricultural or domestic purposes; (9) making of fences; (10) planting of hops; (11) planting of orchards or fruit bushes; (12) reclaiming of waste land; (13) warping of land; (14) embankments and sluices against floods. And see *Meux v. Cobley* (1892), 2 Ch. 253, as to the operation of the Act on the law of w.; and as to improvements under the Settled Land Acts, see Appendix.

Notice of Claim.—"A tenant claiming compensation under this Act, shall, two months at least before the determination of the tenancy, give notice in writing to the landlord of his intention to make such claim.

Landlord's Claim for W.—"Where a tenant gives such notice, the landlord may, before the determination of the tenancy, or within fourteen days thereafter, give a counter-notice in writing to the tenant of his intention to make a claim in respect of any w. or any breach of covenant or other agreement.

"Every such notice and counter-notice shall state, as far as reasonably may be, the particulars and amount of

the intended claim." Agricultural Holdings Act (E.), 1883 (46 & 47 Vict. c. 61), s. 7. And see the Act *passim*.

Allotment.—By 50 & 51 Vict. c. 26 (1887), provision is made for compensation on the determination of a tenancy of an allotment or cottage garden held of a private landlord (s. 5) :

(a) For crops, including fruit, growing upon the holding in the ordinary course of cultivation, and for fruit trees and fruit bushes growing thereon, which have been planted by the tenant with the previous consent in writing of the landlord.

(c) For drains and for any outbuildings, pigsties, fowl-houses, or other structural improvements made by the tenant upon his holding with the written consent of his landlord.

By 53 & 54 Vict. c. 57 (1890), the same provisions are applied as between a mortgagee who takes possession and a tenant of the mortgagor.

Burning Land.—By the Landlord and Tenant (Ireland) Act, 1860 (23 & 24 Vict. c. 154), s. 30, "No tenant under any lease or other contract of tenancy conferring an estate or interest less than a perpetual estate or interest shall burn or permit to be burned the soil or surface of the land, or any part thereof, without the previous consent in writing of the landlord, being a person competent to grant such licence, under a penalty not exceeding twenty pounds for each statute acre or any fractional part of an acre on which burning shall take place, to be recoverable by the immediate landlord by civil bill action in the county in which the tenant usually resides, or in the county in which the lands or any part of them are situate, at the election of the landlord."

Summary Recovery of Possession.—By s. 84, "In case any such cottier tenant, or any tenant for a shorter period

of time than a month, or at will, or by sufferance, shall maliciously or wilfully injure or destroy, or permit to be injured or destroyed, any part of the premises holden by him, and which the landlord is bound to keep in repair, it shall be lawful for the landlord to make his complaint before any one or more Justices of the Peace for the county, not being interested in the said premises, at Petty Sessions, and such Justice or Justices shall summon the tenant before him or them, and hear and determine such complaint; and if it shall be proved to his or their satisfaction that such tenant committed or permitted such injury or destruction upon the said premises, the said Justice or Justices shall, by their warrant in writing, direct any person to be therein named as special bailiff on the part of the landlord to deliver possession of the said premises to the said landlord or owner; and such warrant shall be obeyed and executed by such special bailiff, who shall have full power and authority so to do."

Irish Land Acts.—The Irish Land Act (1870), c. 46, as amended by the Act of 1881, c. 49, declared the Ulster and other tenant customs to be valid, and provided for the payment of compensation to an agricultural or pastoral tenant disturbed in his holding by his landlord, or otherwise quitting his holding, in respect of all improvements, *i.e.* (s. 70): (1) Any work which being executed adds to the letting value of the holding on which it is executed, and is suitable to such holding; also, (2) Tillages, manures, or other like farming works, the benefit of which is unexhausted at the time of the tenant quitting his holding."

By s. 7 of the Act of 1881, a flax scutching mill may be suitable to a holding though available also for purposes beyond those of the holding. A tenant is not to be deemed to be disturbed under the Act of 1870, if he is evicted "by reason of the tenant's unreasonable refusal to

allow the landlord, or any person or persons authorised by him in that behalf, he or they making reasonable amends and satisfaction for any injury to be done or occasioned thereby, to enter upon the holding for any of the purposes following, that is to say: Mining or taking minerals; quarrying or taking stone, marble, gravel, sand, or slate; cutting or taking timber or turf; opening or making roads, drains, and watercourses; viewing or examining the state of the holding and all buildings or improvements thereon; hunting, shooting, or fishing, or taking game or fish. Such eviction shall not be deemed a disturbance of the tenant by the act of the landlord, unless it shall be shown that the landlord is persisting in such eviction after such refusal has been withdrawn by the tenant." S. 14.

By the Land Law (Ireland) Act, 1881, c. 49, power is given to landlords and tenants of agricultural holdings to apply to the Land Commission to fix a fair rent, which when fixed is to hold good for fifteen years. By s. 5, "A tenant shall not, during the continuance of a statutory term in his tenancy, be compelled . . . to quit the holding of which he is tenant except in consequence of the breach of some one or more of the conditions following: (2) The tenant shall not, to the prejudice of the interest of the landlord in the holding, commit persistent w. by the dilapidation of buildings or, after notice has been given by the landlord to the tenant not to commit or to desist from the particular w. specified in such notice, by the deterioration of the soil. (5) The landlord, or any person or persons authorised by him in that behalf (he or they making reasonable amends and satisfaction for any damage to be done or occasioned thereby), shall have the right to enter upon the holding for any of the purposes following (that is to say): Mining or taking minerals, or digging or searching for minerals; quarrying or taking

stone, marble, gravel, sand, brick clay, fire clay, or slate; cutting or taking timber or turf, save timber and other trees planted by the tenant or his predecessors in title, or that may be necessary for ornament or shelter, and save also such turf as may be required for the use of the holding; opening or making roads, fences, drains, and watercourses; passing and repassing to and from the sea-shore with or without horses and carriages for exercising any right of property or royal franchise belonging to the landlord; viewing or examining at reasonable times the state of the holding and all buildings or improvements thereon; hunting, &c. . . .

“And the tenant shall not persistently obstruct the landlord, or any person or persons authorised by him in that behalf as aforesaid, in the exercise of any right conferred by this sub-section.

“During the continuance of a statutory term, all mines and minerals, coals and coal pits, subject to such rights in respect thereof as the tenant, under the contract of tenancy subsisting immediately before the commencement of the statutory term, was lawfully entitled to exercise, shall be deemed to be exclusively reserved to the landlord. . . . Provided that the rent of any holding subject to statutory conditions may be increased in respect of capital laid out by the landlord under agreement with the tenant to such an amount as may be agreed upon between the landlord and tenant.”

By s. 18, the prohibition against letting or sub-letting a holding is not to apply to letting a portion of the land for cottages for labourers employed on the holding. And by s. 19, the Court, on an application to fix rent, may impose conditions as to providing labourers' cottages. So where an agreement and declaration as to fair rent is filed. Labourers' Cottages, &c., Act, 1882, c. 60, s. 3.

By the Land Law (I.) Act, 1887, c. 33, the Act of 1881 was extended to leaseholders whose leases would expire within ninety-nine years of the passing of the Act of 1881.

Malicious Injury by Tenant. — “Whosoever, being possessed of any dwelling-house or other building, or part of any dwelling-house or other building, held for any term of years or other less term, or at will, or held over after the termination of any tenancy, shall unlawfully and maliciously pull down or demolish, or begin to pull down or demolish, the same or any part thereof, or shall unlawfully and maliciously pull down or sever from the freehold any fixture being fixed in or to such dwelling-house or building, or part of such dwelling-house or building, shall be guilty of a misdemeanour.” 24 & 25 Vict. c. 97, s. 13 (E. & I.).

In the Larceny Act, 1861, c. 96, ss. 32–39, are contained provisions for punishing any person who steals, or injures with intent to steal, trees, shrubs, fences, vegetable produce and minerals; and in the following Act, c. 97, are provisions punishing malicious injury to the same, ss. 16–29, 53.

RENEWABLE LEASEHOLDS.

In the first half of this century there was much discussion in the Irish Courts as to whether a tenant for lives renewable for ever was punishable or not for w. No doubt the words of the statute were sufficient to cover this case, but in *Calvert v. Gason* (1805), 2 Sch. & L. 561, Redesdale, L.C., refused an injunction until a Court of Law should determine on the right, saying that it seemed to have been considered in Ireland that these leases were not within the Statute of Gloucester. A similar course was adopted by Manners, L.C., in *Conolly v. Ely* (1810), 2 Molloy 515, and *Percy v. Shanly*, ib.; but in *Pim v.*

Davies (1817), 1 Hogan 11, McMahon, M.R., granted an injunction on evidence that a large amount of rent was due, that the defendant refused to pay, and had threatened to cut down every tree and go to America unless an abatement of rent were granted. Again in *White v. Nowlan*, ib. 21, an injunction was granted on similar grounds, pending an action at law, which resulted in a recovery by the landlord of £400 damages, as appears from a note to *Purcell v. Nash*, 1 Jones 628. This was followed by *Flood v. George* (1821), Lyne on Leases, App. 110, where the tenant was decreed to pay the value of the trees cut down, and by *Waterpark v. Austen* (1822), 1 Jones 627 n., where the tenant was restrained from cutting turf for sale (b), and in *Bouchier v. O'Grady* (1825), 2 Molloy 536, the Judges certified that such a tenant cannot cut turf for sale, where bog is demised with other land. See p. 15.

Another break in the decisions was caused by *Harris v. Coppinger* (1827), 1 Hogan 478, where McMahon, M.R., said that he only enjoined where timber constituted a great part of the value of the premises demised, or when a large arrear of rent was due. On the other hand come *White v. Walsh* (1829), 1 Jones 626 n., where the tenant was restrained although he alleged that he was improving the ground into pasture, and *Purcell v. Nash* (1836), 2 Jones 116, where an absolute injunction was issued against quarrying except for necessary consumption in cultivating the lands. The injunction may have gone too far in including quarries open at the date of the lease. (See p. 103.)

(b) In *Coppinger v. Gubbins*, *infra*, this was treated as depending on the covenant not to commit or permit w.; but even if this was so, which

does not appear, it was equally necessary to decide whether the acts complained of amounted to w.

In *Hunt v. Browne* (1837), S. & Sch. 178, O'Loghlen, M.R., restrained a tenant, who had an option of surrendering his lease at the end of every three years, from converting meadow and pasture into a public cemetery, saying: "Every day's experience shows how very uncertain the duration of an interest under such a tenure is; forfeitures of the right to enforce a renewal daily occur, through the neglect of tenants, or the dexterous management of landlords. Covenants, treated in some cases for more than a century, as entitling tenants to renewals for ever, have been construed by Courts of Justice as not conferring any such right." Then came *Chatterton v. White* (1839), 1 Ir. Eq. R. 200, against the right of such a tenant to cut turf for sale, and lastly *Coppinger v. Gubbins* (1846), 9 Ir. Eq. R. 304, 3 J. & La. 397, where Sugden, L.C., went through the authorities, and held against the claim of the tenant. "There can be no doubt that the Court has a discretion, and if it finds that an improper use is attempted to be made of the legal right—if the w. was clearly meliorating w.—*e.g.*, if the tenant was building a house on the premises, the Court would not grant an injunction against it. Such an act being an improvement, the Court would not exercise its jurisdiction; and no doubt the Court would generally feel reluctant in any manner to cut down the grantee's rights under what is so extensive a conveyance and so usual a title to land in this country. But . . . it now depends on the authorities." See "*Meliorating W.*," pp. 134–144. The Court held that *Calvert v. Gason* is not law.

As to rights of turbary, see p. 44. And as to forfeiture, see Conveyancing Acts, 1881 (s. 14) and 1892.

A tenant in fee subject to an executory devise over is liable for fines on renewals of leaseholds and copyholds. *Blake v. Peters* (1863), 1 De G. J. & S. 345, C. A.

Statutory Modification.—5 Geo. 3, c. 17, s. 1 (Ir. 1765), enacted that “tenants for lives renewable for ever, paying the rents and performing the other covenants in their leases, shall not be impeachable of w. in timber trees or woods, which they shall hereafter plant, any covenant in leases or settlements heretofore made, law, or usage to the contrary notwithstanding.”

By 12 & 13 Vict. c. 105 (Ir. 1849), a reversioner may be required by a lessee or under-lessee in perpetuity to grant an estate of inheritance in fee simple at a fee-farm perpetual rent, but this does not extend, without consent, to any right to timber, timber trees or other trees, woods, underwood, or underground woods, bogs, mosses, turbaries, mines, minerals, quarries, or royalties; nor does it give any new right to estates in dower or by the curtesy. Special remedies are given by the Act, and these are extended to other fee-farm rents by 14 & 15 Vict. c. 20. The Act is further extended to leases granted by the governors of schools, under statutory powers therein mentioned, by 31 & 32 Vict. c. 62 (1868).

Tenants when Impeachable.—Now by 23 & 24 Vict. c. 154 (Ir. 1860), s. 25, “No tenant of any lands entitled to any perpetual interest under any lease or grant made after the first day of January, 1861, shall be impeachable of any w. other than fraudulent or malicious w. except in so far as such tenant shall, by any agreement contained in the lease or grant, be prohibited from doing or permitting any act; provided that no fee-farm grant made under the Renewable Leasehold Conversion Act, or any renewed lease executed after the first of January, 1861, in pursuance of an agreement for renewal contained in a lease made before the passing of this Act, shall be deemed to be a perpetual interest made after the first day of January, 1861, within the meaning of this section.”

PARTICULAR TENANTS.

Tenant at Will.

Tenants in Common and Joint Tenants.

TENANT AT WILL.

Voluntary W.—If a tenant at will commits voluntary w. he is liable to an action for trespass, for by committing w. his tenancy is determined. *Countess of Shrewsbury's Case* (1600), 5 Coke 13 a, Cro. El. 777, 784; *Walgrave v. Somerset* (1587), 4 Leon. 167, pl. 271; Broke, W. pl. 52; *Parrott v. Barney* (1868), 22 Myers' Fed. Dec. Landlord and Tenant, s. 200. And see *Burchell v. Hornsby* (1808), 1 Campbell 360; *Kimpton v. Eve* (1813), 2 V. & B. 349.

Cutting Wood.—There are two cases mentioned in Broke's Abr. pl. 114, 126, which support the right of a tenant at will to cut seasonable wood. In 12 Edw. 4, 8, such a tenant of twenty acres of wood was held entitled "to cut seasonable trees, but not the great of trees, and he can sell the seasonable wood, or give or make what he likes of it, for it could not otherwise be intended." He shall have only the grain of great trees. And, semble, in 8 Edw. 4, 6, 7, that as long as the tenant at will is not forbidden, he can cut seasonable wood. It is suggested that it would not be safe to act on this authority. See Broke, pl. 131, where it is said, referring to 2 Edw. 4, 22, that it was conceded (Cur. Littleton) that he cannot cut underwood without licence.

Any cutting by the lessor without the consent of the lessee is an ouster. Co. Lit. 55.

As to permissive w., see p. 215.

TENANTS IN COMMON AND JOINT TENANTS (a).

A large number of cases in the books are occupied with questions as to the appropriate remedies between tenants in common for wrongs committed, and with questions of pleading, but these may now be generally disregarded.

Statutory Writ.—A writ of w. was first granted by Statute of Westminster 2nd, 13 Ed. 1, c. 22, repealed by 42 & 43 Vict. c. 59, and this Act applied to joint tenants as well. Co. Lit. 200 a, 2 Inst. 403. In Co. Lit. 200 b, it is said: "If there be two tenants in common of a wood, turbary, piscary, or the like, and one of them doth w. against the will of his companion, his companion shall have an action of w."

Liable for Ouster or Destructive W.—"One tenant in common cannot be treated as a wrongdoer by another, except for some act which amounts to an ouster of his co-tenant or to a destruction of the common property," per Montague Smith, J., in *Jacobs v. Seward* (1869), 4 C. P. 328, affirmed (1872), 5 H. L. 464, where the lessee of one co-tenant reaped the whole crop of hay. The Court refused to allow amendment so as to turn the action into one of account. And see *Noye v. Reed* (1827), 1 M. & R. 63. And the customs of husbandry do not apply as between tenants in common, unless the injury amounts to w. *Bailey v. Hobson* (1869), 5 Ch. 180.

Profits Made.—The only restriction on a tenant in common, working, &c., for profit, is that he must not

(a) Distinguish cases of purchase for a common undertaking, when ordinary partnership rules prevail. *Lake v. Oraddock* (1732), 1 W. & T. L. C.

appropriate more than his share. If he works a mine by himself or his tenant, his companion is entitled to a share of the value of the coal at the pit's mouth, less the cost of severing and raising. Damage caused by working may be repaired by the lessee before action. *Job v. Potton* (1875), 20 Eq. 84, p. 99, per Bacon, V.C.

Exclusive Occupation.—All tenants in common are equally entitled to possession, and none can complain of trespass or make his companion liable for occupation rent, unless the occupation is exclusive. *McMahon v. Burchell* (1846), 2 Ph. 127, C. A., per Cottenham, L.C.; Co. Lit. 322; *Murray v. Hall* (1849), 7 C. B. 441. But if he hold over after the expiration of a lease from his companion, he is liable. *Leigh v. Dickeson* (1884), 15 Q. B. D. 60.

Farming Profits.—Even farming profits made by personal enjoyment are not divisible amongst the occupier's co-tenants, as he is only liable to account under 4 Anne, c. 16, s. 27, if he receive from a third person more than the proper share coming to him as tenant in common. *Henderson v. Eason* (1847), 2 Ph. 308, 17 Q. B. 701. He would be liable apart from the statute, if he had been actually or impliedly appointed bailiff of his companion. *Wheeler v. Horne* (1740), Willes 208.

No Injunction v. Acts of Ownership.—"Each tenant in common is entitled to exercise acts of ownership over the whole property." *Griffies v. G.* (1863), 8 L. T. N. S. 758. So in *Goodwyn v. Spray* (1786), 2 Dick. 667, Lord Thurlow refused an injunction to prevent the cutting of timber, saying the only remedy was partition (and account). But if special damage can be proved, an action lies for that, as if a whole flight of pigeons be destroyed by the cutting. *Waterman v. Soper* (1698), 1 Ld. Raymond 737, Holt, C.J. And in *Hole v. Thomas*

(1802), 7 Vesey 589, no injunction was granted against w. generally, but only against destructive w., *e.g.*, cutting at unseasonable times, "one tenant in common having a right to enjoy as he pleases." *Anon.* (1564), Moore 71, pl. 194. In *Arthur v. Lamb* (1865), 2 Dr. & S. 428, Kindersley, V.C., concluded that the defendant was acting in accordance with good management and refused an injunction.

Destructive W.—The cutting of turf in a close under licence from a co-tenant is an ouster of the other co-tenants, and the licensee is liable to an action of trespass, for the cutting amounts to destruction, which a co-tenant cannot authorise. *Wilkinson v. Haygarth* (1847), 12 Q. B. 837. Denman, L.C.J., said that the Court would not act on *Goodwyn v. Spray*, u.s., without knowing the circumstances of that case more fully; but if the timber was ripe, it seems to be good law and in accordance with *Job v. Potton*, u.s., &c. And if cutting turf was a proper method of making profit out of the close, the licensee would not be liable for trespass.

Co-tenant who is also Lessee.—A tenant in common is not in any worse condition from being tenant of the other moiety, and he can therefore cut trees fit to be cut, being liable only for half their net value in a proper action. *Martyn v. Knowllys* (1799), 8 Durn. & E. 145, Kenyon, L.C.J. In *Twort v. T.* (1809), 16 Vesey 128, a co-tenant who was in a similar position was restrained by Lord Eldon from ploughing ancient meadow, upon the ground that by his agreement he impliedly engaged to treat the land as an occupying tenant should, and the injunction went in general terms upon the same ground. But ploughing ancient meadow is w. apart from any agreement, which, however, would be implied, if necessary. See p. 18, &c.

After Decree for Sale w. will be restrained, *Wright v. Atkyns* (1813), 1 V. & B. 313, but only destructive w. The selling of hay and turnips off the land does not amount to w., though contrary to the custom of the country as between landlord and tenant. *Bailey v. Hobson* (1869), 5 Ch. 180. See p. 32, &c.

Ornamental Trees.—Probably the Court would not restrain the cutting of ornamental timber, if it would not be protected on any other ground. *Twort v. T.*, u.s.

Insolvency.—An injunction will be granted if it be shown that the waster is insolvent and unable to pay his companions their shares of the timber cut. *Smallman v. Onions* (1792), 3 Bro. C. C. 620.

Pulling down Houses, &c.—As to whether an action will lie against one who pulls down a house in order to rebuild it, see *Cubitt v. Porter* (1828), 8 B. & C. 270; Com. Dig. Estates (K. 8).

Where the owners of five-sixths had pulled down the common buildings and laid a railway line, the dissenting owner was not restrained from pulling up the rails. *Durham & Sunderland, &c. v. Wawn* (1840), 3 Beav. 119.

One tenant in common of a reversion can sue for damage to the reversion without joining his co-tenant. *Roberts v. Holland* (1893), 1 Q. B. 665.

Repairs.—One tenant in common has no right to compel contribution for ordinary repairs. *Leigh v. Dickenson* (1884), 15 Q. B. D. 60; cf. *Johnson v. Wild* (1890), 44 Ch. D. 146. But in a partition action an account will be taken of the present value, not exceeding the actual expenditure, of money laid out in repairs and permanent improvements. *In re Jones* (1893), 2 Ch. 461, North, J. But for substantial repairs a tenant in common or a joint tenant can compel contribution. Co. Lit. 546.

Boundary Trees.—There is a conflict of judicial opinion as to the criteria by which the ownership of boundary trees should be judged, in the absence of a ditch or other evidence. In *Anon.* (1623), 2 Rolle R. 255, it was held that ownership followed nourishment and was in common, and to the same effect is *Waterman v. Soper* (1698), 1 Lord Raymond 737, per Holt, C.J. On the other hand Littledale, J., directed the jury that the tree was his in whose land it was first planted, following the apparent effect of *Masters v. Pollie* (1621), 2 Rolle R. 141, 207. See Hunt on Boundaries.

The cases may not really be inconsistent, for if it cannot be shown in whose land the tree was planted and is growing as to its main trunk, it is only possible to follow the roots and adjudge accordingly; so that the practical effect will be that where it cannot be shown on whose land the whole girth of the trunk is growing, there will be a tenancy in common. See an excellent judgment in *Lyman v. Hale* (1837), 11 Day (Conn.) 177.

Release.—"In an action of w. brought by two, the release of one shall bar the other, as it is held in 9 Hen. 5, 15 a, *per curiam*, for in w. the personalty is the principal." *Tooker's Case. Rud. v. Tooker* (1601), 2 Coke 66 a; Broke, W. 73. But this does not apply to a tenancy in common.

Death of One Joint Tenant.—Upon the death of a joint tenant the right of action in tort remains to the survivor only, but in contract the right of action passes to the legal personal representatives of the deceased if his interest in the contract was several, but not if it was joint only. Williams on Executors, 9th ed., 1774, &c. Of course the interest of a tenant in common is several. And so is that of a joint adventurer, who is in fact a partner. *Lake v. Craddock* (1732), 1 W. & T. L. C.

PARTICULAR TENANTS (*Continued*).

Husband and Wife.

Dower.

Curtesy.

Jointure.

Infant.

Lunatic.

Stranger.

HUSBAND AND WIFE.

Statutory Action and Other Remedies.—The old action of w., now abolished, did not lie against a husband in respect of his wife's life estate, though he had committed w., *Southcote v. Clifton* (1593), 5 Coke 75, but, of course, he was liable to an action on the case and for tort. See *Paget v. Read* (1682), 1 Vern. 143, 1 Eq. Ca. Ab. 61.

Joint Tenants.—Where the husband and wife were joint tenants for life, it was held under the old law that the wife could not, after the death of her husband, sue the husband's assignees for w. in permitting houses to become ruinous, as she could not have sued in her husband's life. *Bacon v. Smith* (1841), 1 Q. B. 345, *in banc.*, Patterson, J., saying that the rule in Co. Lit. 53 *b*, that the reversion must continue "in the same state that it was at the time of the w. done," applies equally to an action on the case as to the old action of w. But formerly in respect of houses one joint tenant had a writ *de reparatione facienda* against his joint tenant, and now a wife

may sue her husband for "the protection and security of her own separate property," M. W. P. Act, 1882, s. 12.

Impounding Income.—The wife's income will not be impounded if the value of the w. (committed in this case by both husband and wife) is brought into Court, or otherwise secured. *Stacey v. Southey* (1853), 1 Dr. 400.

Copyholds.—It was resolved in *Clifton v. Molineux* (1585), 4 Coke 27, "that where a woman, tenant for life, takes husband and the husband commits w. against the custom of the manor, and dies, the estate of the wife is utterly forfeited by the act of the husband. But if a stranger commits w. without the assent of the husband, it is no forfeiture." From which we may gather that since M. W. P. Act, 1882, if the husband commits w. without the assent of his wife, there is no forfeiture.

Where a wife was entitled for life to freehold estates, subject to a condition that she should keep the buildings in good repair and commit no w., Shadwell, V.C., held that, as upon her marriage this estate vested in her husband, she was no longer subject to this obligation during the coverture, but that he was, *Kingham v. Lee* (1846), 15 Simon 396. Since the M. W. P. Act, 1882, the estate does not vest in the husband, and consequently he is not subject to the condition, although he would be liable for his own or his wife's tortious acts, or for the benefit of any w. by whomsoever committed, so far as received by him.

Curtesy.—A tenant by the curtesy is in the same position as any other tenant for life impeachable of w.; and see Bright's "Husband and Wife," vol. i. 147, and "W. by Stranger," *infra*, p. 283. In *Roberts v. R.* (1657), Hardre 96, an injunction was continued at the suit of an infant against her father and grandfather to stay w. on land of

which her mother had been tenant in tail, in whose life the contract for sale of the timber had been made (by the father, as it seems). Held "that w. is by law a forfeiture of the father's guardianship, and that the contract made nothing in the case."

Dower.—A widow, while she continues tenant in dower, is liable for w. by herself or a stranger, but not for w. committed after the privity is severed. See *infra*, p. 283. Co. Lit. 53, 54; 2 Inst. 303, etc.; *Lewis Bowles' Case* (1616), 11 Coke 82. She is, of course, entitled to the ordinary profits of a tenant for life, *e.g.*, poles and small timber, *Dickin v. Hamer* (1860), 1 Drew. & Sm. 284, and generally to a share of the profits of mines opened with her consent, S. C.

Jointure.—In *Lady Evelyn's Case*, cited 2 Swans. 172 n., a jointress for life was awarded an injunction against the next tenant for life, who was unimpeachable and entered by leave of her tenant at will and committed w.

If she herself gives leave to a subsequent tenant to commit w., she will be protected by injunction from the suit of a remainderman who acquiesced. *Aston v. A.* (1750), 1 Vea. sen. 396, per Hardwicke, L.C.

A jointress, who is also tenant after possibility of issue extinct, is entitled to the proceeds of w. *Williams v. W.* (1810), 12 East 209. See "Tenant after Possibility," p. 159.

11 Hen. 7, c. 20 (1494), which prohibits alienation, for longer than her life, by a widow of lands of her husband, in which she takes an estate in dower, or for life or in tail, does not extend to prevent a jointress in tail from committing w. in felling timber, &c. *Skelton v. S.* (1677), 2 Swans. 170 n., per Nottingham, L.C.

An injunction against a jointress was granted in *Cooke v. Winford or Whaley* (1701), 1 Eq. Ca. Ab. 221, 400. *Bassett v. B.* (1674), Finch 190.

But in *Carew v. C.* (1698), 1 Eq. Ca. Ab. 400, a jointress with a covenant for jointure, which fell into arrear, was not enjoined from committing w. so as to make up the covenanted amount.

INFANT.

Remedy v. Guardian.—The Common Law gave a remedy against w. committed by a guardian, holding by operation of law and not by agreement or special appointment. Co. l. 54 a, 2 Inst. 299.

In *Burgh v. Wentworth* (1576), Cary 76, the executors of a guardian in socage were ordered to answer as to profits taken by their testator from the infant's lands.

Order for Cutting Timber.—Where an infant is entitled to an estate in possession or reversion an order for cutting timber can be obtained from the Court of Chancery, which will act on the principle of *Hussey v. H.* (1820), 5 Madd. 44, where Leach, V.C., said: "As to the estate of which the plaintiff is tenant in tail in possession, the Court will authorise the cutting of all timber which is fit and proper to be felled, in a due course of management; but as to the devised estate (which was in reversion) the Court can only authorise the cutting of such timber as is decaying, or which it is beneficial to cut, by reason that it injures the growth of other trees." And see "Cutting under Order of the Court" (p. 201, &c.); and as to latter point, *Mildmay v. M.* (1792), 4 Bro. C. C. 76.

Statutory Powers of Management.—Where the instrument under which the infant is entitled comes into opera-

tion after 31 Dec., 1881, the Conveyancing Act, 1881, s. 42 applies, so far as a contrary intention is not expressed in the instrument. This section is printed below, p. 274.

En Ventre sa Mere.—An injunction to protect the estate of an infant *en ventre sa mère* was granted in *Lutterell's Case*, cited in *Hale v. H.* (1692), Prec. Ch. 50; and in *Robinson v. Litton* (1744), 3 Atk. 209, Lord Hardwicke said he should have no scruple in granting such an order.

Maintaining Premises.—"In many cases the Court will order money of an infant to be laid out in discharging incumbrances, and even in keeping up house and garden, as lately in the case of Lord Shaftesbury." *Ex p. Grimstone* (1772), Amb. 706; 4 Bro. C. C. 235. See p. 230, &c. *In re Colyer* (1886), 55 L. T. 344, the use of a house was given to B. for life, and the trustees were directed to keep the premises and furniture in repair, to insure and pay rates and taxes. Kay, J., held that they were only bound to act within the letter of the will, and not, *e.g.*, to keep the gardens in order; and that if it was desirable to do more, they should apply to the Court for directions, taking care that the property should not become deteriorated. See pp. 238, 240.

Residence.—See *Bennett v. Wyndham* (1857), 23 B. 521, as to whether it is proper to keep up a mansion house during infancy or whether it should be let. As to repairs on an infant's estate, see p. 230.

Tenant in Tail Dying. Profits.—A guardian (by nurture in this case) is right in making any advantage of the estate of the infant; and so where she cut between £7,000 and £8,000 worth of timber on the estate of a dying tenant in tail, an injunction was refused, and subsequently, on the death of the tenant in tail, it was held that the remainderman was not entitled to the timber felled. *Saville v. S.*, cited *Moseley* 224, Amb. 370, 1 Ves. 547, 2 Atk. 458.

In *Ferrand v. Wilson* (1845), 4 Hare, at p. 374, Wigram, V.C., held that timber on settled estates is like rents and profits in that it is alienable during the infancy of the tenant in tail, and the settlor may not superadd a disability, making it inalienable; and in *Clavering v. C.* (1729), Moseley 219, King, L.C., held that the guardian of an infant tenant in tail was right in opening mines.

In *Cross's Settlement* (1864), 10 L. T. 405, a compromise was sanctioned between the representatives of a tenant for life, who had wasted, and the trustees of an infant remainderman. See p. 312. Infant remaindermen are not proper parties to an agreement between two persons entitled between them to timber cut during the life of one, for the purchase of the interest of the other. *Anon.* (1822), 1 L. J. Ch. 33.

Conversion.—Nearly all the authorities on the subject of conversion of an infant's estate are before the Wills Act, 1837, and in them it was held that where an infant was tenant in fee simple, the timber, if felled, was not converted, but went on his death to his heir. *Tullit v. T.* (1759), Amb. 370, following *Mason v. M.*, there cited, and *Lyddal v. Clavering* (1741), where Lord Hardwicke had said: "Infant tenant in tail has the same right as one of full age, with respect to the remainderman," and *Saville v. S.*, u.s. And see *Ex p. Phillips* (1812), 19 Ves. 118. Where the infant was tenant in tail, it was held that the timber was converted into personalty (see same cases), for the reason that otherwise it would be lost to his estate and would go with the settled property, whereas he then had a power of testamentary disposition over personal estate after attaining fourteen. Now, however, though the Wills Act has taken away this power, there seems still the same reason why timber or coal

should be reckoned converted in the case of a tenant in tail; and in *Dyer v. D.* (1865), 34 Beav. 504, Romilly, M.R., held that timber cut under the order of the Court on the estate of an infant tenant in fee simple, subject to an executory devise over, which took effect, was part of his personal estate. In any case this would be so, as such a tenant is without impeachment of w. See p. 205.

In *Rook v. Warth* (1750), 1 Ves. sen. 460, Hardwicke, L.C., held that money collected in churches to go towards rebuilding a house of an infant tenant in tail, which had been burnt down, formed part of the settled property. And see generally as to powers of guardians and trustees during infancy, "Simpson on Infants," &c.

Management of Land and Receipt and Application of Income.—S. 42 of the Conveyancing Act, 1881, is as follows :

"(1.) If and as long as any person who would but for this section be beneficially entitled to the possession of any land is an infant, and being a woman is also unmarried, the trustees appointed for this purpose by the settlement, if any, or if there are none so appointed, then the persons, if any, who are for the time being under the settlement trustees with power of sale of the settled land, or of part thereof, or with power of consent to or approval of the exercise of such a power of sale, or if there are none, then any persons appointed as trustees for this purpose by the Court, on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land; and in every such case the subsequent provisions of this section shall apply.

"(2.) The trustees shall manage or superintend the management of the land, with full power to fell timber or cut underwood from time to time in the usual course

for sale, or for repairs or otherwise, and to erect, pull down, rebuild, and repair houses, and other buildings and erections, and to continue the working of mines, minerals, and quarries which have usually been worked, and to drain or otherwise improve the land or any part thereof, and to insure against loss by fire, and to make allowances to and arrangements with tenants and others, and to determine tenancies, and to accept surrenders of leases and tenancies, and generally to deal with the land in a proper and due course of management; but so that, where the infant is impeachable for w., the trustees shall not commit w., and shall cut timber on the same terms only, and subject to the same restrictions, on and subject to which the infant could, if of full age, cut the same.

“(3.) The trustees may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by this section, or otherwise in relation to the land, and all outgoings not payable by any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on the land.

“(4.) The trustees may apply at discretion any income which, in the exercise of such discretion, they deem proper, according to the infant's age, for his or her maintenance, education, or benefit, or pay thereout any money to the infant's parent or guardian, to be applied for the same purposes.

“(5.) The trustees shall lay out the residue of the income of the land in investment on securities on which they are by the settlement, if any, or by law, authorised to invest trust money, with power to vary investments; and shall accumulate the income of the investments so

made in the way of compound interest, by from time to time similarly investing such income and the resulting income of investments; and shall stand possessed of the accumulated fund arising from income of the land and from investments of income on the trusts following (namely):

“(i.) If the infant attains the age of twenty-one years, then in trust for the infant;

“(ii.) If the infant is a woman and marries while an infant, then in trust for her separate use, independently of her husband, and so that her receipt after she marries, and though still an infant, shall be a good discharge; but

“(iii.) If the infant dies while an infant, and being a woman without having been married, then, where the infant was, under a settlement, tenant for life, or by purchase tenant in tail or tail male or tail female, on the trusts, if any, declared of the accumulated fund by that settlement; but where no such trusts are declared, or the infant has taken the land from which the accumulated fund is derived by descent, and not by purchase, or the infant is tenant for an estate in fee simple, absolute or determinable, then in trust for the infant's personal representatives, as part of the infant's personal estate;

but the accumulations, or any part thereof, may at any time be applied as if the same were income arising in the then current year.

“(6.) Where the infant's estate or interest is an undivided share of land, the powers of this section relative to the land may be exercised jointly with persons entitled to possession of, or having power to act in relation to, the other undivided share or shares.

“(7.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

“(8.) This section applies only where that instrument comes into operation after the commencement of this Act.” (31st December, 1881.)

As to the exercise of powers under the Settled Land Acts, see p. 386.

LUNATICS.

By the Statute *Prerogativa Regis*, 17 Ed. 2, Stat. 1 (1324), c. 9 & 10, it was enacted as follows: “The King shall have the custody of the lands of natural fools, taking the profits of them without w. or destruction, and shall find them their necessities, of whose fee soever the lands be holden. And after the death of such idiots he shall render it to the right heirs, so that such idiots shall not aliene, nor their heirs shall be disinherited. 10. Also the King shall provide, when any (that beforetime hath had his wit and memory) happen to fail of his wit, as there are many per lucida intervalla, that their lands and tenements shall be safely kept without w. and destruction, and that they and their household shall live and be maintained competently with the profits of the same, and the residue besides their sustentation shall be kept to their use, to be delivered unto them when they come to right mind; so that such lands and tenements shall in no wise be aliened; and the King shall take nothing to his own use. And if the party die in such estate, then the residue shall be distributed for his

soul by the advice of the ordinary." The jurisdiction of the Crown was, however, earlier than this. See per Lord Bathurst in *Ex p. Grimstone* (1772), Amb. 706 ; 4 Bro. C. C. 235.

Meaning of "Waste."—The w. in these statutes means destruction, and not such w. as would occur in proper management of an estate by a sane owner. *Ex p. Bromfield* (1792), 1 Ves. jun. 453 ; 3 Bro. C. C. 510 ; 2 Eden 148, per Thurlow, L.C.

Cutting for Repairs.—"Committees of the real estate of a lunatic may exercise the same power over it in regard to cutting timber for repairs, as any discreet person who was the absolute owner might do." *Ex p. Ludlow* (1742), 2 Atk. 407, per Hardwicke, L.C., in which case the committees were ordered to make good to the personal estate the money expended in purchasing timber for repairs, there being sufficient on the estate, to which, moreover, the committees were themselves entitled after the death of the lunatic.

Proceedings by Committee.—They are the proper persons to take proceedings to protect the estate. *Re Chinnery* (1844), 1 Jones & L. 90, following *Re Creagh* (1809), 1 Ball & B. 108, &c. But leave should first be obtained from a Judge in Lunacy. See Elmer, Pope, Daniell's Ch. Pr. &c.

Conversion, &c.—In *Ex p. Bromfield*, u.s., Thurlow, L.C., held that w. by breach of trust does not in Equity alter the character of the material severed, e.g., timber, but that it goes to the heir ; otherwise where cut under an order of the Court or by a stranger tortiously, or by tempest.

There is no equity between the heir and legal personal representatives of a lunatic ; they must take the estate as they find it, therefore the heir has no right to the pro-

ceeds of timber cut under an order of Court. *Oxenden v. Compton* (1793), 4 Bro. C. C. 231. If the trustees of a settlement whereof there is a tenant in tail in possession, have also a restricted power of cutting under a private Act, this Act will not be held to abridge their greater power as representing a lunatic tenant in tail, and the proceeds should not be invested as part of the settled funds. *Ex p. Clayton* (1830), 1 R. & M. 369.

As a general rule the Court will take care not to alter the condition of the property to the prejudice either of the heir or next of kin (see Lewin on Trusts, p. 1096, &c.; Pope on Lunacy, 362, &c.), except where the conversion is for the clear benefit of the lunatic, and in directing money to be laid out in land or permanent improvements the Court will insert words in the order and conveyance to preserve the rights of the heir and legal personal representatives inter se. Seton on Decrees, 5th ed. 872; *A. G. v. Ailesbury* (1887), 12 A. C. 672. Cf. *Gist* (1877), 5 Ch. D. 881. But where the repairs are ordinary and necessary, no charge will be declared. *Badcock* (1840), 4 M. & Cr. 440.

Where the proceeds of timber had been applied under an order of the Court in the redemption of land tax, Eldon, L.C., refused after the death of the lunatic to declare a charge on the lands in favour of the next of kin, but he said that timber cut down on an estate goes as personal estate, if not otherwise applied. *Ex p. Phillips* (1812), 19 Ves. 118.

In *Mary Smith* (1874), 10 Ch. 79, James, L.J., said: "To a certain extent this Court can deal with real estate, with regard to timber for instance . . . ; that is, if in the due management of the estate it is necessary to cut down timber which is too old, or which it is desirable to cut

down for the benefit of other timber, then that would be understood as done in the due management of the estate, like cutting a crop of hay. Of course, in that case it is converted into a chattel, the value of which belongs to the personal estate. But to dispose of a piece of fee simple land, or to dispose of a whole wood upon the land, or the whole minerals under it, is in fact disposing of the lunatic's real estate in substance."

Lunacy Act, 1890.—The material sections of the Lunacy Act, 1890, 53 Vict. c. 5, are as follows :

Power to raise Money for Certain Purposes.—"117. (1) The Judge may order that any property of the lunatic, whether present or future, be sold, charged, mortgaged, dealt with, or disposed of as the Judge thinks most expedient for the purpose of raising or securing, or repaying with or without interest, money which is to be or which has been applied to all or any of the purposes following :

"(a) Payment of the lunatic's debts or engagements ;

"(b) Discharge of any incumbrance on his property ;

"(c) Payment of any debt or expenditure incurred for the lunatic's maintenance or otherwise for his benefit ;

"(d) Payment of or provision for the expenses of his future maintenance.

Charge for Permanent Improvements.—"118. (1) The Judge may order that the whole or any part of any moneys expended or to be expended under his order for the permanent improvement, security, or advantage of the property of the lunatic, or of any part thereof, shall, with interest, be a charge upon the improved property or any other property of the lunatic, but so that no right of sale or foreclosure during the lifetime of the lunatic be conferred by the charge.

"(2) The interest shall be kept down during the lunatic's lifetime, out of the income of his general estate, as far as the same is sufficient to bear it.

"(3) The charge may be made either to some person advancing the money, or if the money is paid out of the lunatic's general estate, to some person as a trustee for him, as part of his personal estate.

Powers exercisable by Committee under Order of Judge.

—"120. The Judge may, by order, authorise and direct the committee of the estate of a lunatic to do all or any of the following things :

- "(a) Sell any property belonging to the lunatic ;
- "(b) Make exchange or partition of any property belonging to the lunatic or in which he is interested, and give or receive any money for equality of exchange or partition ;
- "(c) Carry on any trade or business of the lunatic ;
- "(d) Grant leases of any property of the lunatic for building, agricultural, or other purposes ;
- "(e) Grant leases of minerals forming part of the lunatic's property, whether the same have been already worked or not, and either with or without the surface of other land ;
- "(f) Surrender any lease and accept a new lease ;
- "(g) Accept a surrender of any lease and grant a new lease ;
- "(h) Execute any power of leasing vested in a lunatic having a limited estate only in the property over which the power extends ;
- "(i) Perform any contract relating to the property of the lunatic entered into by the lunatic before his lunacy ;
- "(j) Surrender, assign, or otherwise dispose of with or

without consideration any onerous property belonging to the lunatic ;

“(k) Enter into any agreement touching the patronage of augmented cures under the Act one George the First, chapter ten, which the lunatic might have entered into if he had been of sound mind ;

“(l) Exercise any power or give any consent required for the exercise of any power where the power is vested in the lunatic for his own benefit or the power of consent is in the nature of a beneficial interest in the lunatic.

Lunatic's Interest in Property not to be Altered.—“123.

(1) The lunatic, his heirs, executors, administrators, next of kin, devisees, legatees, and assigns, shall have the same interest in any moneys arising from any sale, mortgage, or other disposition, under the powers of this Act which may not have been applied under such powers, as he or they would have had in the property the subject of the sale, mortgage, or disposition, if no sale, mortgage, or disposition had been made, and the surplus moneys shall be of the same nature as the property sold, mortgaged, or disposed of.

“(2) Moneys received for equality of partition and exchange, or under any lease of unopened mines, and all fines, premiums, and sums of money received upon the grant or renewal of a lease, where the property the subject of the partition, exchange, or lease was real estate of the lunatic, shall, subject to the application thereof for any purposes authorised by this Act, as between the representatives of the real and personal estate of the lunatic, be considered as real estate, except in the case of fines, premiums, and sums of money received upon the grant or renewal of leases of property of which the lunatic was

tenant for life, in which case the fines, premiums, and sums of money shall be personal estate of the lunatic.

“(3) In order to give effect to this section the Judge may direct any money to be carried to a separate account, and may order such assurances and things to be executed and done as he thinks expedient.”

As to the powers of a lunatic tenant for life under the Settled Land Acts, see p. 387.

WASTE BY A STRANGER (a).

Responsibility for W. by Stranger.—It is abundantly clear that a tenant is responsible for w., not only when committed by himself, but also when made by a stranger, whose acts, as there is no privity of estate, are really trespass and not w. Perhaps the clearest statement on the subject is to be found in 2 Rolle Abr. 821, where it is said, pl. 1: “If a stranger commit w., still an action of w. lies against lessee, for in a trespass he shall recover his damages against the stranger. 2. So if a stranger disseises the lessee and commits w. 3. If a man having common of estovers in the land in lease, makes w., as in cutting wood which he ought not, an action of w. lies against lessee for that. 6. If lessee for life lease for years and the latter makes w., w. lies against lessee for life. 8. Tenant in curtesy and tenant in dower shall be punished for w. done by a stranger. Co. Lit. 54. 11. An infant shall be punished in action of w. for w. done by a stranger. Co. Lit. 54.” All this is now subject to the right of a defendant to add the stranger as a party. Jud. Act, 1873, s. 24, sub-s. 3, Order 16, rr. 48–55.

(a) 8 Bacon 402, 7 Comyn 650.

Grant or Assignment Over.—If a tenant by curtesy or in dower grant over their estate and the grantee wastes, w. lies against them by the reversioner, the reason given being that their grantee is not tenant by curtesy or in dower. But if the heir grant over the reversion, the privity is gone and the grantee of the tenant may be sued. If any other tenant grants over the entirety of his estate, the grantee alone is liable for w. subsequently committed. Co. Lit. 54 *a*, 2 Inst. 302, 2 Rolle Abr. 828. And although an assignment of a whole term contains an exception of trees, &c., this exception is void. 2 Rolle Abr. 454. But if, notwithstanding the assignment over, the grantors take the profits, an action lies against them. Co. Lit. 54 *a*. So if a tenant assign part of his estate, excepting the trees, and the assignee cuts them. 2 Inst. 302. "In all other cases the action of w. shall be brought against him that did the w.," *ib*.

Action by Reversioner.—In *Attersoll v. Stevens* (1808), 1 Taun. 183, an action brought against a stranger by a tenant for years, who himself had permission to w. on paying an increased rent, the plaintiff was held entitled to the whole damages though he would have to pay a smaller sum to his lessor. Chambre, J., said, at p. 194: "The reversioner may in all cases maintain an action on the case against such stranger, whether the tenancy be at will, for years, or life; or he may, if he pleases, waive the penal action of w., even against the tenant, and bring case against him." He then proceeded to say that the liability of the tenant for w. by a stranger is not founded on the presumption of collusion. "The act indeed is considered as the act of the tenant, but the reason assigned is, that he may withstand the commission of w., et qui non obstat quod obstare potest, facere videtur." It was also held

that one who covenants against w. does not covenant against w. by a stranger. It may further be said in support of the right of action against the tenant, that the obligations of the latter arise in some particulars *quasi ex contractu* and not simply from tort, and this makes a difference upon the death of the person alleged to be liable. See *Batthyany v. Walford* (1887), 36 Ch. D. 269, *supra*, p. 241.

Berry v. Heard (1632), Cro. Car. 242, was a case in which a landlord successfully brought trover against a stranger for carrying away the bark of fallen timber which he had wrongfully cut. After severance the whole property in them is in the landlord, and so the tenant cannot bring such an action as trespass, the gist of which is that the property is in the plaintiff. *Evans v. E.* (1810), 2 Camp. 491. But he may maintain trespass for any injury to his interests, *e.g.*, in cutting. *Bedingfield v. Onslow* (1685), 3 Lev. 209.

Reparation before Action.—The defence of reparation before action brought, which is good in an action of w., does not avail a stranger in an action of trespass, for he would be committing an additional trespass by entering to repair. *Taylor v. Stendall* (1845), 7 Q. B. 634.

Trees Excepted from Deed.—Where trees are excepted from a lease, it is not w. but trespass in the lessee to fell them. He is in the position of a stranger to this extent. *Goodtitle v. Vivian* (1807), 8 East 190; *Lewknor's Case* (1587), 4 Leon. 162. See p. 48.

MORTGAGOR AND MORTGAGEE.

THE rights of mortgagor and mortgagee in respect of the mortgaged premises may in some particulars, though not with strict accuracy, be viewed as part of the law of w.

Mortgagor's Rights. Security Sufficient.—A mortgagor in possession has the right, so long as the security is not defective, to cut timber and open and work mines. And an injunction will be refused “unless it be made to appear that the security would be insufficient or scanty without the timber.” *Hippesley v. Spencer* (1820), 5 Madd. 422, per Leach, V.C. On proper evidence of insufficiency it will be granted, but it will not be extended to underwood, even where the debt is in danger, for this is a crop (α). *Humphreys v. Harrison* (1820), 1 J. & W. 581, per Eldon, L.C., except in special circumstances, as in *Hampton v. Hodges* (1803), 8 Vesey 105, where it was granted to cover the interval between bankruptcy and the choice of assignees. See now Conveyancing Act, 1881, s. 19, p. 366.

Evidence of Insufficiency.—The only difficulty in applying the law on this matter, is the quantum of evidence required to prove the insufficiency of the security. In *Blaney v. Mahon* (1723), 2 Eq. Ca. Ab. 758, 22 Viner 521, an injunction was granted on proof that the interest

(a) Cf. *Farrant v. Lovel* (1750), 3 ib. 209; *Usborne v. U.* (1740), Atk. 723; *Robinson v. Litton* (1744), Dickens 75.

was in arrear. In *King v. Smith* (1843), 2 Hare 239, an action asking for a sale, it was proved that after bill filed, the defendant, who took all the estate and property of the mortgagor under his will, had felled and was felling a large number of timber and timber-like trees. The plaintiffs moved for an injunction, which was refused on the ground of failure of evidence. Wigram, V.C., said, however: "The difficulty I feel is in discovering what is meant by a 'sufficient security.' Suppose the mortgage debt, with all the expenses, to be £1,000, and the property to be worth £1,000, that is, in one sense, a sufficient security; but no mortgagee who is well advised would lend his money unless the mortgaged property was worth one-third more than the amount lent at the time of the mortgage. If the property consisted of houses, which are subject to many casualties to which land is not liable, the mortgagee would probably require more. It is rather a question of prudence than of actual value. I think the question which must be tried is, whether the property the mortgagee takes as a security is sufficient in this sense—that the security is worth so much more than the money advanced—that the act of cutting timber is not to be considered as substantially impairing the value, which was the basis of the contract between the parties at the time it was entered into. I have read the affidavit, and I cannot find that either the rental or income of the property appears; but it seems that the substantial part of it consists of houses, which might make it a more serious question, whether the Court should permit the mortgagor to cut the timber." In *Harper v. Aplin* (1886), 54 L. T. 383, Pearson, J., granted an injunction to prevent the felling of trees, where the security was admitted to be deficient, although the mortgagor offered

to pay the mortgagee the value of the timber in reduction of the loan.

In *Goodman v. Kine* (1845), 8 Beav. 379, Langdale, M.R., granted an injunction to prevent a mortgagor pulling down a house after *decree nisi*.

Power to Mortgage.—A power to mortgage does not give the donee power to cut timber and apply the proceeds to the purposes of the mortgage. *Lee v. Alston* (1789), 1 Ves. jun. 78, Thurlow, L.C.

Rights of Mortgagee.—An early case on the rights of the mortgagee in possession is *Withrington v. Banks* (1725), Select Ca. 30 (fol. ed.), where Price, B., said: "A mortgagee in fee at law may commit w., but never in Equity; unless it appears the security is defective, which is not here." He ordered an account and injunction, and directed that the value of the timber felled should be applied in the first place in payment of interest and then in sinking the mortgage. See now Conveyancing Act, 1881, s. 19, p. 366.

In *Hughes v. Williams* (1806), 12 Vesey 493, Erskine, L.C., disallowed the expense of opening a quarry by a mortgagee in possession, this not being authorised by the mortgage deed. But in *Millett v. Davey* (1862), 31 Beav. 470, the estate was held to be of insufficient value, even including the minerals, when the mortgagee entered into possession. Thirteen years after this he combined with the owner of the other moiety to lease some abandoned mines, but failed to make a profit beyond a small royalty. Romilly, M.R., said: "Where the security is insufficient . . . a mortgagee is entitled to make the most of the property for the purpose of realising what is due to him. He may cut timber, he may open a mine . . . provided he is not committing wanton destruction. . . . But where a mortgagee, so circumstanced, is acting *bona*

fide . . . the Court will never interfere to prevent his felling timber or opening a mine and the like, but he does it at his own risk and peril; so that, if he incurs a great loss in working the mine, he cannot charge a penny of that loss against the mortgagor, and if he obtains a great profit, the whole of that profit must go in discharge of his mortgage debt."

Repair.—A mortgagee in possession is not bound to leave the premises in as good condition as he found them. *Russell v. Smithies* (1793), Ambler 96.

Improvements.—He is entitled, in account on sale or in a redemption action, to an allowance for lasting improvements, so far as they increase the value of the premises. *Shephard v. Jones* (1882), 21 Ch. D. 469, C. A., approved in *Henderson v. Astwood* (1894), A. C. 150.

Out of Possession.—Though the mortgagee is not in possession, still if he permits strangers to open mines beneath the mortgaged premises, which he himself is not authorised to open by the mortgage deed, he will be held responsible, and an account may be ordered against him of damage to the surface and of coal worked, without any allowance for the cost of severance and conveyance to the surface; per Stuart, V.C., in *Hood v. Easton* (1856), 2 Jur. N. S. 729, following *Thorneycroft v. Crockett* (1848), 16 Simon 445, before Shadwell, V.C., who disallowed the expense of opening and working mines though the working had been profitable. See "Account," *infra*, p. 353. Where it appeared by the affidavit of the actual occupier of the land that the w. was not done by the mortgagee or by his authority, an injunction was refused. *Anon.* (1823), 1 L. J. 119, Leach, V.C.

Purchase Money Unpaid.—An unpaid vendor is entitled to restrain the purchaser of an estate from cutting timber after

the contract and before the conveyance. *Crockford v. Alexander* (1808), 15 Vesey 138 ; cf. *Marshall v. Watson* (1858), 25 Beav. 501 ; *Rawlins v. Burgis* (1814), 2 V. & B. 387.

Income Pending Foreclosure.—In the case of *Godden* (1892), 1 Ch. 292, the testator had taken possession of a mine, and a question arose as to the income derived from the mine in the interval between his death and foreclosure by the trustees. It is evident that the life tenants were not entitled to the whole income, as the mine did not form part of the testator's estate, and North, J., decided that the capital of the estate was entitled to such a sum as would at £4 per cent. from the death, with annual rests, have amounted to the sum received at the date of the foreclosure, and that the remainder was income to which the life tenants were entitled.

Taking Possession. Excepted Trees.—Notice by the mortgagees to the tenant of a farm, from whose lease underwoods, timber, and shooting were excepted, coupled with an injunction against the mortgagor to prevent cutting on the ground of insufficient security, is not a taking possession by the mortgagees of anything except the farm. *Simmins v. Shirley* (1877), 6 Ch. D. 173, per Fry, J.

Trespass on Adjoining Mine.—In *Powell v. Aiken* (1858), 4 K. & J. 343, is given a form of order where mortgagor and mortgagee had successively trespassed on adjoining coal measures.

Impounding Incumbered Life Estate.—The right of impounding the interest of a tenant for life to recoup w. committed by him is valid, even against incumbrancers of his life interest who have acquired their rights previous to the w. committed. *Briggs v. Oxford* (1855), 1 Jur. N. S. 817.

Injunction.—In a foreclosure decree, the defendant not appearing, an injunction to stay w. will not be granted ;

but only on an interlocutory application. *Kettle v. Corbin* (1758), 1 Dickens 314.

Rent-charge.—A grantee of a rent in fee, with right of entry on default in payment, and of taking the profits until satisfied, may not cut trees or commit w., but only take ordinary profits. *Jemmott v. Cooly* (1663), 1 Lev. 171.

Rights of Parties under Conveyancing, &c., Act, 1881.—In the Appendix will be found the sections of the Conveyancing Act, 1881, which give to the party in possession certain rights of leasing, and to the mortgagee by deed a power of sale over the mortgaged property or any part thereof, including a power to sell timber and other trees ripe for cutting, ss. 18–22.

Portions.—"In Mr. Offley's marriage settlement there was a term for raising £10,000 for a daughter, but it was so short that the ordinary profits of the land would not raise above half the sum; but there was a coal mine in the land, which was open at Mr. Offley's death, which the Court ordered should be wrought, and the trustees to have power to make soughs and drains in any other the lands of the heir, as need should require, so as it were done in an orderly manner, so that the money might be raised. And my Lord Commissioner Hutchins said that in such case, where the usual profits of the land will not raise the money appointed within the time, this Court may order timber to be felled off the land to make it up." *Offley v. O.* (1691), Prec. Ch. 26.

In *Saville v. S.* (1720), 2 Atk. 458, Select Cases 32, Tracy, J., held that an unimpeachable life tenant is not liable to an injunction nor to account for the value of timber cut and sold by him, though there were unsatisfied portions charged by a long overriding term. But in this case it was not shown that the security for the portions was insufficient.

COPYHOLDS.

It is only intended here to treat of copyholds apart from custom of the manor. Copyhold tenants are not within the Statutes of Marlbridge and Gloucester, though in *Eastcourt v. Weeks* (1699), 1 Salk. 186, Lutw. 246, they seem to have been treated as within.

Forfeiture.—"If a copyholder commits w. contrary to the custom of the manor, this is a forfeiture." 1 Rolle Abr. 508; cf. *Edwards v. Heather* (1724), Select Cas. 3, a case of w. in cutting timber.

Permissive W.—"A copyholder, though regarded as a tenant at will, is obliged to keep the tenements in repair; for which reason he is entitled to botes or estovers by the general law, without alleging a special custom. He is, therefore, contrary to other tenants at will, or at least to those who hold strictly at will a Common Law estate, answerable for permissive as well as for voluntary w." Watkin 331. So it is said in *Rook v. Warth* (1750), 1 Vesey 460, Belt 200: "The copyhold tenant being subject to w. by the general rule of law (no custom to the contrary being shown), this might have been considered by the lord of the manor as w.; for unless it is a burning by lightning or the act of God, the destruction of a house by fire, unless in convenient time repaired, is w." As to fire merely accidental, see 14 Geo. 3, c. 78, s. 86. Again, "If a copyholder suffers a house to decay and be wasted, this

is a forfeiture." 1 Rolle Abr. 508; cf. *Rastell v. Turner* (1597), Cro. El. 598.

Botes or Estovers (a).—A copyholder may lop without special custom, but he may not top, for that might cause putrefaction. *Dawbridge v. Cocks* (1594), Cro. El. 361; 1 Brownl. 132; 22 Viner 445, 448.

It was resolved in *Heydon v. Smith* (1611), 13 Co. 67, 2 Brownl. 328, "that of common right, as a thing incident to the grant, the copyholder may take as housebote, hedgebote, and ploughbote upon his copyhold; quia concessio uno conceduntur omnia sine quibus id consistere non potest; et quando aliquis aliquid concedit, concedere videtur et id sine quo res ipsa non potest. . . . But the same may be restrained by custom." And see *Swayne's Case, S. v. Beckett* (1609), 8 Co. 63 a.

"If a copyholder cuts great trees, sc. elms, to repair his copyhold house which is in decay and employs them accordingly, this is no forfeiture, for this the law allows to him without any custom to warrant it." 1 Rolle Abr. 508; *East v. Harding* (1596), Cro. El. 498. If he cut down more than are wanted by an error of judgment, this is no forfeiture, ib. But if, instead of employing them in repair, he suffers them to decay, this is a forfeiture, ib. It is a question for the jury whether trees have been *bond fide* cut for repairs and are in due course of application to that object; *Doe v. Wilson* (1809), 11 East 56. "Where timber is assigned to be applied in repairs, I agree, in point of law it must be specifically applied; yet it is very

(a) "And it is to be known that bote and estovers are all one; *estovers* are derived from this French word *estover*, i.e., *fovere*; i.e., to keep warm, to cherish, to defend; and there are four kinds of estovers . . .

sc., firebote, ploughbote, housebote, and hedgebote." *Heydon v. Smith* (1611), 13 Co. 67, 2 Brownl. 328. But the New English Dictionary gives the derivation as from *estovoir*, to be necessary.

hard to say, and it could not be said in this Court, that, if the tenant sold the timber, it should not be applied in repairs," per Lord Loughborough in *Dench v. Bampton* (1799), 4 Vesey, p. 703. See p. 298. In most cases the damages would be purely nominal.

Mast and Young Birds.—The copyholder shall have the mast and the young of birds which breed in the trees. *Ashmead v. Ranger* (1700), 1 Lord Raymond 551, 11 Mod. 18 (reversed apparently on another point in Dom. Proc.).

Lord cannot Mine or Fell.—It was resolved in *Heydon v. Smith* (1611), 13 Co. 67, 2 Brownl. 328, "that the lord cannot take all the timber trees, but he ought to leave sufficient for the reparation of the customary houses, and for ploughbote, &c., for otherwise great depopulation will follow, sc., ruin of houses and decay of tillage and husbandry." But neither can cut down trees, except for tenant's botes, apart from custom. *Chapple's Case* (1727), 6 Viner 228. And Lord Eldon held in *Whitchurch v. Holworthy* (1812), 19 Vesey 213, 4 M. & S. 340, that a lord has no right apart from custom to enter and cut trees, even upon a "wood estate," though offering to leave sufficient botes and estovers. So in *Eardley v. Granville* (1876), 3 Ch. D. 826, Jessel, M.R., said: "The estate of a copyholder in an ordinary copyhold (for it is an estate) is an estate in the soil throughout, except as regards for this purpose timber trees and minerals. As regards the trees and minerals, the property remains in the lord, but, in the absence of custom, he cannot get either the one or the other, so that the minerals must remain unworked, and the trees must remain uncut; the possession is in the copyholder, the property is in the lord. If a stranger cuts down the trees, the copyholder can maintain trespass

against the stranger, and the lord can maintain trover for the trees. If the lord cuts down the trees, the copyholder can maintain trespass against the lord; but if the copyholder cuts down the trees, irrespective of the question of forfeiture, the lord can bring his action against the copyholder (b). So in the case of minerals. If a stranger takes the minerals, the copyholder can bring trespass against the stranger for interfering with his possession, and the lord may bring trover, or whatever the form of action may be now, against the stranger to recover the minerals. The same rule applies to minerals as to trees."

Copyhold of Inheritance.—A copyholder for life with right of nominating his successor, may prescribe to cut timber. *Powel v. Peacock* (1603), Noy 2; *Rowles v. Mason* (1612), 1 Rolle Abr. 560; 1 Brownl. 132, 2 ib. 85; dist. in *Mardiner v. Elliot* (1788), 2 Durn. & E. 746. And the law is the same where the tenant holds a customary copyhold, i.e., not nominally at the will of the lord, but in fee according to the custom of the manor. *Powel v. Peacock*, u.s. And such a tenant may so deal with his estate as to make successive tenants for life unimpeachable of w. without any cause of complaint by the lord. *Denn v. Johnson* (1808), 10 East 267. But where there is no such prescriptive right, the lord cannot be compelled to accept a surrender in such a form as would make the tenant unimpeachable. 1 Watkin 299 n.

Minerals.—See *Eardley v. Granville*, u.s. Neither the tenant without the licence of the lord, nor the lord without the licence of the tenant, can dig new mines,

(b) *Oage v. Dod* (1650), Style 233; The law is the same in the case of a
cf. *Eastcourt v. Weeks* (1699), Lutw. windfall. *Ailmer's Case* (1663), 1
246, 2 Freem. 516; *Berry v. Heard* Keble 691.
(1623), Cro. Car. 242, Palmer 327.

Winchester v. Knight (1717), 1 P. Wms. 406 ; although the tenant holds according to the custom of the manor and not at the will of the lord, *Portland v. Hill* (1866), 2 Eq. 765, per Page Wood, V.C.

In *Grey v. Northumberland* (1810), 13 Ves. 236, 17 ib. 282, Lord Eldon granted an interlocutory injunction against the lord to stay w. in opening mines, so that an alleged custom in his favour might be tried at law, but afterwards, in consequence of delay, said he would dissolve the injunction, especially as the lord was but life tenant, unless some means of speedy trial were ensured. Cf. *Bourne v. Taylor* (1808), 10 R. R. 267, 10 East 189 ; *Player v. Roberts* (1632), W. Jones 243.

Though a lord may mine by custom, he may not use an underground tramway for carrying minerals dug outside the manor, or for draining or ventilating other parts of the mine or other mines. *Bowser v. Maclean* (1860), 2 D. F. J. 415, per Campbell, L.C.

A tenant cannot remove large stones partially imbedded in the soil, unless they are shown to be a recent fall and so not portion of the soil. Semble, he has a right to remove stones "loose and recently brought upon the land, or even larger stones which were incumbering the land, for the advantage of the copyhold estate." *Dearden v. Evans* (1839), 5 M. & W. 11. And probably he may remove stone from underneath the surface for the improvement of cultivation. *Cuddon v. Morley* (1848), 7 Hare 202 ; cf. *Hoyle v. Coupe* (1842), 9 M. & W. 450.

Copyhold of Inheritance.—"It seems to me that a copyholder of inheritance cannot, without a special custom, dig for mines ; neither can the lord dig in the copyholder's lands, for the great prejudice he would do to the copyhold estate ; and the copyholder himself seems

to have no interest in the inheritance of the lands. Copyholder may dig for marl to lay upon the copyhold land; he cannot inclose where it was never inclosed before." Gilbert's Tenures, 327. "It seems he may dig for marl to manure the lands with, or take turf for necessary fuel, and it will be no forfeiture, as these seem to be proper estovers." Watkin on Copyholds, 333.

Houses.—As to the duty of repairing, see p. 292.

Pulling Down.—It is w. for a remainderman to pull down houses built by a life tenant. Semble, it is otherwise if the building was never roofed in so as to become a house. *Brock v. Beare* (1611), 1 Bulstrode 50, 2 D'Anv. 194, Gilbert 235. It must be alleged and proved that the house, &c., was covered in, and that the building was affixed to the soil. *Bedford v. Smith* (1553), Dyer 108 b; *Ward's Case* (1611), 4 Leonard 241. Where the jury find that no damage has been caused by pulling down and not rebuilding, no forfeiture occurs; *Doe v. Burlington* (1833), 5 B. & Ad. 507, where a barn was destroyed.

Rebuilding.—"I have no hesitation in saying that a mortgagee of a copyhold may pull down ruinous houses, and may build much better houses," per Lord Loughborough, L.C., in *Hardy v. Reeves* (1799), 4 Vesey 466; but it may be w. to build a house less commodious or larger. See note to *Greene v. Cole*, 2 Wms. S. 644, and p. 134.

New Houses.—In general, it is a question whether it is w. to build a new house where none was before. In a case quoted in *Ward's Case* (*infra*) it is shortly said that a woman copyholder built a new house upon the land, and it was agreed to be a forfeiture. But in *Cecil v. Cave* (1596), 1 Rolle Abr. 507, "If a copyholder erect a new house on his copyhold without licence, this is no forfeiture, for it is for the melioration of the tenement although he alters the

nature of the land by it, and this is not w. in a lessee for years." But see p. 12, &c. No doubt it is in reality a question of fact whether any substantial injury has been done or not. See as to building on land not copyhold, p. 138. In *Grey v. Ulisses* (1625), Latch 122, Dyer 211 b, there is an obiter dictum that if a tenant erect a mill upon his copyhold it is a forfeiture.

Injunction.—In *Richards v. Noble* (1807), 3 Mer. 673, Eldon, L.C., granted an injunction against cutting turves, though forfeiture was not waived, but see *Blake v. Peters* (1863), 1 De G. J. & S. 345, C. A. It was refused in *Parrott v. Palmer* (1834), 3 M. & K. 632, as the lord had long lain by and allowed the tenant to expend money in mining; but Brougham, L.C., said that *Dench v. Bampton* (1799), 4 Ves. at p. 703, where also an injunction was refused, was clearly not law. In this last case, however, it is to be noticed that the lord had only a qualified right to the timber, and the w. was trivial.

An interim injunction to restrain mining was granted where there was a dispute as to whether the defendant was free- or copy-holder, *Greenwich Hospital v. Blackett* (1848), 12 Jurist 151; so where the tenant declined to try his right at law, though defending on the ground of better cultivation, *Cuddon v. Morley* (1848), 7 Hare 202. Where a tenant defends on the ground of custom (to dig turves), his evidence must be very strong to prevent an injunction going, *Ely, Dean, &c. v. Warren* (1741), 2 Atk. 189, unless the land be fenny, for otherwise to carry away soil is destructive of the holding.

In voluntary w., at all events, it lies upon the defendant to prove that it is not against the custom of the manor. *Downingham's Case* (1594), Owen 17; *Farmer v. Ward* (1595), Noy 51.

In *Cornish v. New* (1675), Finch 220, a life tenant was restrained at the instance of the remainderman in fee of copyholds.

In *Hilton v. Granville* (1841), Cr. & Ph. 283, the lord was not restrained as the circumstances showed a strong inference in his favour.

Miscellanea.—W. and forfeiture by a tenant for life does not bind the remainderman, 1 Rolle Abr. 509, especially if it occurs by collusion with the lord, *Rastell v. Turner* (1597), Cro. El. 598, where an outhouse was burnt. But in general the lord and not the remainderman takes advantage of a forfeiture, *Doe v. Clements* (1813), 2 M. & S. 68.

The tenants of copyholders are punishable, though their immediate landlords are not. *Dalton v. Gill* (1577), Cary 63.

W. by Stranger.—Formerly w. by a husband occasioned forfeiture of the wife's estate, *Clifton v. Molineux* (1585), 4 Co. 27, where it is also said that w. by a stranger, without assent, is no forfeiture. On the contrary are *Anon.* (1563), Moore 49, pl. 149; 1 Watkin 126 n.

Relief from Forfeiture.—Although a tenant may have incurred forfeiture at law, Equity has intervened from very early times to relieve, where the w. has not been intentional (c), or where the forfeiture is on the ground of non-payment of money, such as rent or fines, or is for the securing the fulfilment of some collateral object.

In *Peachy v. Somerset* (1720), 1 Str. 447, 2 W. & T. L. C., where the tenant had leased without licence, Macclesfield, L.C., refused to relieve, saying: "The true ground for relief against penalties is from the original intent of the case, where the penalty is designed only

(c) See *Thomas v. Porter*, *ubi infra*.

to secure money, and the Court gives him all that is expected or desired." But in *Sloman v. Walter* (1784), 1 Bro. C. C. 418, 2 W. & T. L. C., a case before Thurlow, L.C., of penalty under a bond, relief was granted where forfeiture was to secure a collateral object. Cf. *Dench v. Bampton* (1799), 4 Ves. 700.

In *Commin v. Kingsmell* (1591), Tothill 108, the tenant, on payment of a fine, was relieved from forfeiture incurred by cutting timber and employing it on his own customaryhold. It does not appear if the cutting was through ignorance or not. Again, in *Nash v. Derby* (1705), 2 Vernon 537, 1 Eq. Ca. 121, where the tenant cut timber, under a supposed custom, on one holding and employed it in repairing another, relief was given on payment of the costs of the suit and of two ejectment actions, per Lord Keeper Wright. And in *Thomas v. Porter* (1667), 1 Eq. Ca. Ab. 121, 1 Ch. Ca. 95, relief was given to a tenant *durante viduitate*, as it was not her intention to do w. As to relieving life tenants, see *Hill v. Barclay* (1811), 18 Ves. 64.

In *Taylor v. Hooe* (1583), Tothill 205, 6 Viner 151, it was held incumbent on the lord to prove that the w. had been done by direction of the copyholder and not by his tenant, as w. by the latter does not, *per se*, cause forfeiture. *Cage v. Dod* (1650), Style 233. Nor does w. by a stranger. *Clifton's Case, C. v. Molineux* (1585), 4 Co. 27.

There is jurisdiction in Equity to restrain a lord illegally seizing a holding as forfeited, notwithstanding there be also a remedy at law; per Page Wood, V.C., in *Andrews v. Hulse* (1858), 4 K. & J. 392.

On the other hand persistent non-repair will not be aided, *Cox v. Higford* (1710), 2 Vernon 664, 1 Eq. Ca.

121, where, however, the Lord Keeper said he thought even voluntary w. might be relieved. Apart from equitable relief, repair before action brought will not remedy forfeiture, *semble*, *Cornwallis v. Horwood* (1625), Latch 227, Palmer 416 ; but see *Rook v. Warth*, p. 292.

No interlocutory injunction will be granted at the instance of several tenants to prevent the lord from proceeding in ejectment against one of them. *Sefton v. Salisbury* (1859), 7 W. R. 272, Page Wood, V.C.

No injunction will be granted to prevent the lessee of a tenant for life mining under a lease, on the ground that the life estate will be forfeited, as a man cannot disaffirm his own lease. *Wentworth v. Turner* (1795), 3 Ves. 3, cf. *Keogh v. Collins* (1834), Hayes & J. 805.

Infant.—An infant may have relief though he does not apply until a very long time after his majority. *Litton's Case* (1599), Cary 8.

RIGHTS OF COMMON.

THE three rights of common which seem chiefly to come within the purview of the present book are:—the commons of estovers, pasture, and digging for minerals.

Estovers.—"Common of estovers comprises the right of taking wood for the following purposes, viz. : 1. Housebote, which is of two kinds, the greater and the less, the greater being a liberty to fell timber for repairs and rebuilding houses after accidental destruction, and the less being a like liberty of taking the tops and lops of pollards and other trees, shrubs, dead wood, and underwood for fuel in the commoner's house ; 2. Ploughbote, or the privilege of taking timber and other wood for repairing the waggons and implements used in the commoner's husbandry ; 3. Hedgebote or haybote, for repairing gates and fences, or making temporary inclosures in an open field when the corn is sown. Common of turbary is a right of taking peat or turf from the waste land of another for fuel in the commoner's house." Elton on Commons, 83, 95 ; 2 Blackstone's Com. 35.

All rights of common must be limited either by actual quantities, or the size of the w., or the requirements of the holding. All rights which are not so limited are not common rights but separate rights of property in

the thing claimed And this is the case where a destructive right is claimed, *e.g.*, of cutting dry surface turf, Elton, &c., 95. An example of such a right may be seen in the case of *Dowglass v. Kendal* (1610), Cro. Jac. 256, where the defendant prescribed to have all the thorns, which was adjudged good, and that he could take them away when cut by the lord. 1 Rolle Abr. 406.

If a lord's lessee cuts housebote in a place where others have common of estovers (and so as to leave insufficient for the commoners), this is w. 2 Rolle Abr. 816, pl. 3 & 4.

If the tenant have firebote he may cut timber for fuel if he cannot find sufficient underwood. Elton 86.

If A. cuts for housebote and the wood proves unfit, he cannot use it for any general purpose for which he has no bote, nor can he sell and buy fit wood with the money (though if he cut honestly the damages would be but nominal), and it was further held "that he cannot enlarge the house with the timber nor board the sides of a barn there, which had mud walls or the like before." *Earl of Pembroke's Case* (1636), Clayton 47.

One who has a common must strictly follow his right; so if a commoner of estovers is disturbed one year, he must bring his action, and may not take double the quantity in the following year. *Thomason v. Mackworth* (1666), O. Bridgman, at p. 509.

Pasture.—One who has only a common of pasture "hath not an interest in the soil; for he cannot meddle with the wood, grass, or other profit arising of the soil, but the interest which the commoner hath is only the feeding of the grass with the mouths of his cattle," *Anon.* (1587), 2 Leonard 201. He cannot even dig a trench to let off water. 1 Rolle Abr. 406. The lord has

himself a right of keeping his beasts and conies on the land, and for any excess the commoner has a right of action for damages, but may not himself abate the wrong, *Cooper v. Marshall* (1757), 1 Burrow 259, and see other cases cited in Hall on Profits à Prendre. If the lord put hay or straw on the common he cannot justify chasing out the cattle of the commoners to protect his property, as the wrong began in himself. *Farmer v. Hunt* (1611), Cro. Jac. 271, Yelv. 201, 1 Brownl. 220.

Pannage is merely the right to take mast by the mouth of pigs, and is subject to the right of the lord to manage his trees and cut his timber in due course. *Chilton v. London, Corp.* (1878), 7 Ch. D. 562. As to the extent of the lord's right to plant trees on a common, see *Kirby v. Sadgrove* (1797), 1 Bos. & P. 13, 6 Durn. & E. 183, 3 Anst. 892. And as to agreements between lords and commoners for inclosing for the purpose of planting and preserving trees, see 29 George 2, c. 36, 31, ib. c. 41.

Encroachment.—The lord may encroach “by occasion of a windmill, sheepcote, dairy, inlarging of a court necessary, or curtilage,” without being liable to an action (1285), 13 Ed. 1, c. 46 (7).

A lord may take minerals from the w. so long as he does not interfere with the exercise of commonable rights, and perhaps he may take without stint in cases where there is no “permanent depriving of the tenant of the benefit” claimed. *Hall v. Byron* (1877), 4 Ch. D. 667, Hall, V.C., and see the cases cited in the judgment. The onus probandi is on the tenant, whereas in approvement under the Statute of Merton it is on the lord, ib. As to the lord's right under a special Inclosure Act, see *Buccleuch v. Wakefield* (1870), 4 H. L. 377. Lord

King is reported in Cruise, "Common," 50, 5 Viner 7, as saying: "The lord had a right to open mines in the w. of a manor, and why not to dig brick earth; especially where the bricks were made for one of the tenants of the manor, and to be employed in building upon the manor."

Approvement.—Where a tenant has a right of taking gravel and sand, or any right of estovers, the lord cannot enclose under the Statute of Merton, *Duberley v. Page* (1788), 2 Durn. & E. 391; nor where he has common of turbary, *Grant v. Gunner* (1809), 1 Taunton 435, the statute only applying where there is a mere common of pasture. 20 Hen. 3, c. 4 (1235).

Remedy.—"If the lord doth inclose any part, and leave not sufficient common in the residue, the commoner may break down the whole inclosure, because it standeth upon the ground which is his common." 2 Inst. 88; *Mason v. Cæsar* (1676), 2 Mod. 65; *Arlett v. Ellis* (1827), 7 B. & C. 346, 9 D. & R. 897. "The distinction seems to be this: if the lord of the manor make a hedge round the common, or do any act that entirely excludes the commoner from exercising his right, the latter may do whatever is necessary to let himself into the common; but if the commoner can get at the common and enjoy it to a certain extent, and his right be merely abridged by the act of the lord, in that case his remedy is by an action on the case . . . and he cannot assert his right by any act of his own. Here the trees had become part of the inheritance, and according to some of the cases a commoner cannot touch the soil," per Kenyon, L.C.J., in *Kirby v. Sadgrove* (1797), 6 Durn. & E. 483. As to the right to pull down an encroaching dwelling-house, and generally, see note to *Potter v. North* (1668), 1 Wms. S. 653.

One commoner may sue in Equity on behalf of himself and all other similar commoners, *Smith v. Brownlow* (1870), 9 Eq. 241, and may bring an action in the nature of a Bill of Peace, Hall, p. 377, Williams on Commons.

One commoner may have an action against another for surcharging. Comyn's Dig. Common.

8 & 9 Vict. c. 118 (Inclosure, 1845), s. 98, is as follows :
" Provided also, and be it enacted, That in every case in which the right to all or any of the mines, minerals, stone, and other substrata under any land inclosed under this Act shall exist as property distinct and separate from the property in the surface, and shall not be compensated upon the inclosure, the right and property in such mines, minerals, stone, or other substrata, and all rights and easements auxiliary to or connected with the exercise or enjoyment of the right and property in such mines, minerals, stone, or other substrata, shall be in nowise affected by the inclosure ; and in case any mines, minerals, stone, or other substrata under any land inclosed under this Act, or the right of searching for or getting the same, shall have been leased or agreed to be leased to any person or property distinct and separate from the property in the surface, with or without powers over the surface of the land auxiliary to the purposes of such lease, the rights of the lessee or tenant under such lease or agreement shall be in nowise affected by the inclosure.

" 99. And be it enacted, That the timber trees and other trees and underwood standing and growing upon any land to be inclosed shall be allotted and go along with the land whereon they respectively stand, and shall be deemed the property of the several persons to whom the same land shall be respectively allotted, such person paying to the owner of such trees and underwood such sums

of money for the same, and at such time or times and place or places, as the valuer shall by writing under his hand direct; but if the parties who are to make such respective payments shall neglect or refuse to make the same accordingly, then it shall be lawful to and for the respective parties who shall be entitled to have and receive such payments to enter on the said lands, and cut down, take, and carry away to their own use the said trees and underwood in respect of which the said payments were respectively to be made to them, at any seasonable time or times within one year next after such neglect or default, doing as little damage on the land as may be."

By 15 & 16 Vict. c. 79 (*Inclosure, 1852*), s. 16, "Fruit trees standing and growing upon any land to be inclosed shall not be dealt with as timber trees and other trees are by the said firstly-recited Act directed to be dealt with, but shall be allotted and go along with the land whereon they respectively stand, and shall be deemed the property of the several persons to whom the same land shall be respectively allotted; and in estimating the value of such allotments the valuer shall make such allowance for the increased value of the land by reason of the fruit trees standing and growing thereon as he shall deem just and reasonable."

TRUSTEES, ETC.

Trustees Generally. *Perpetuity.* *Trustees to Preserve Contingent*
Remainders. *Legal Personal Representatives.*

Miscellanea. Expenditure for Infants.—Of course trustees for infants will be allowed the sums properly expended by them, *Re Colyer* (1886), 55 L. T. 344, and *Bridge v. Brown* (1843), 2 Y. & C. C. C. 181, where also they were disallowed an unnecessary expense in pulling down a farmhouse and rebuilding it.

Power to Fell. Rights of Beneficiaries.—A mere power given to trustees to cut timber for a particular purpose will not affect the rights of the beneficiaries *inter se*. Thus in *Downshire v. Sandys* (1801), 6 Vesey 107, a term was given to trustees to raise certain sums of money, with power to cut timber other than that ornamental to a particular mansion. Eldon, L.C., said, at p. 115: "It is not to be denied, that the terms 'without impeachment of w.', as applied to trustees of a term for special purposes, have a very different sense from that of the same words annexed to a tenancy for life; and in the ordinary case I do not apprehend the Court would have permitted the trustees to execute their trust by cutting timber, merely because they were trustees without impeachment of w., though they might at law. This Court would say that

having a discretion, they must act in their trust as the Court itself would act. There is no pretence, therefore, to say that limitation would in the ordinary case enable them to cut timber; much less that species of timber which a tenant for life unquestionably might have cut."

So in *Davies v. Wescomb* (1828), 2 Sim. 425, before Hart, V.C., real estates were devised to trustees in trust for sale for payment of debts, and subject thereto for A. for life without impeachment. The trustees cut down and sold timber and other wood for payment of debts, but it was held that the life tenant was "entitled to a charge on the inheritance for the sum for which the timber and other wood were sold." See *Kekewich v. Marker* and *Briggs v. Oxford*, *infra*, p. 314.

Double W.—On the other hand an unimpeachable life tenant with power of sale cannot appropriate the value of the timber on a sale under the power. *Doran v. Wiltshire* (1792), 3 Swans. 699, per Thurlow, L.C. See *Cockerell v. Cholmondeley*, *infra*, and p. 149. This would follow also from the fact that the property in trees, &c., does not pass to a tenant for life, dispunishable, until severance, see p. 148.

Mines. Timber Estate. Investment.—A trustee of residuary personal estate to be laid out in land should not invest in an estate which is heavily timbered, when the life estates are unimpeachable; and if they do, the life tenants will not be allowed to exercise their legal rights. It makes no difference that another estate has been purchased on which there is no timber. *Burges v. Lamb* (1809), 16 Vesey 174; *Jones' S. E.* (1855), 1 Jur. N. S. 817; but in *Bellot v. Littler* (1874), 30 L. T. N. S. 861, 22 W. R. 836, under a power to invest in hereditaments "adjoining" the settled estates, Jessel, M.R.,

sanctioned the purchase by trustees of minerals underlying the settled estates and as to a small part immediately and laterally adjoining. See now the Settled Land Act, 1882, ss. 6–11, 35 (Appendix), and consider its effect on the powers of trustees to purchase. Probably it has none.

Sales of Land apart from Timber or Minerals are generally speaking bad. Thus in *Cockerell v. Cholmondeley* (1832), 1 Cl. & Fin. 60, the H. L. upheld the judgments of the Court below, refusing to aid the execution of a power which the Courts of Law had held to be invalidly exercised. Here the land was sold at a fixed price and the timber at a valuation, which was paid to the tenant for life, dispunishable, who conveyed the timber, while the trustee conveyed the soil. Now by 22 & 23 Vict. c. 35, s. 13, where there is a *bond fide* sale under a power and a wrong person is allowed to receive the value of the timber or other articles attached to the land, the Court may establish the sale upon payment by the purchaser of the full value of the timber, &c. By 40 & 41 Vict. c. 18, s. 16, the Court may authorise sales of settled estates apart from timber, and of timber apart from settled estates. In *Newman's S. E.* (1874), 9 Ch. 681, timber moneys were directed to be laid out in permanent improvements. See the Settled Land Act, 1882, s. 17, Appendix.

Reservation of Minerals.—In *Buckley v. Howell* (1861), 29 Beav. 546, Romilly, M.R., held that a power of sale cannot validly be exercised if minerals are reserved so that an unimpeachable life tenant can work them. “The purchase money is to be reinvested in land, and if an estate with valuable minerals under it were found to be the most eligible mode of investment, the tenant for life would get the minerals from under the two estates.”

Now by 25 & 26 Vict. c. 108, trustees or other persons authorised to dispose of land by sale, exchange, partition, or enfranchisement, may dispose of lands and minerals separately, subject to the previous sanction of the Court, unless forbidden by the instrument creating the trust or power. And by the Settled Estates Act, 1877, *supra*, s. 19, minerals may be excepted from sales under the Court. In sales under the Settled Land Act, 1882, minerals may be reserved, s. 17. See Appendix, p. 375. *Newcastle's Estates* (1883), 24 Ch. D. 129.

So in sales, &c., under the Lunacy Act, 1890, s. 120; *Re Dicconson* (1880), 15 Ch. D. 316. And see generally Farwell on Powers.

Precatory Trust.—Where it was not clear whether there was a precatory trust giving the estate over after the death of the life tenant, the Court allowed timber to be cut in a husbandlike manner and the money to be brought into Court, so as to preserve the property until the question could be determined on the death. *Wright v. Atkyns* (1823), T. & R. 143, Eldon, L.C.

Cutting Ornamental Trees.—In *Campbell v. Allgood* (1853), 17 Beav. 623, Romilly, M.R., said the burden of proof was on the trustees who justified cutting ornamental trees on the ground that they were prejudicial to the healthiness of the house. “I think they ought to have applied, either to the persons interested in the property for their assent, or to the Court for its authority for cutting these trees.” (Qu. whether trustees with power of leasing have not inherent authority to do what is reasonable to secure tenants.) The costs were ordered to come out of the estate.

Void Trust.—Where trustees or executors acting under an innocent mistake, cut timber under a void trust,

retaining no benefit for themselves, they will not be charged as guilty of a breach of trust, but will be allowed to plead the Statute of Limitations or any other legal defences. *Ferrand v. Wilson* (1845), 4 Hare, at p. 383. See now the Trustee Act, 1888, c. 59, s. 8, p. 358.

Trustee-Reversioner.—In *Bays v. Bird* (1726), 2 P. Wms. 397, one of three trustees for a charity of a term of 500 years, purchased the reversion and cut timber, leaving enough for repairs and botes; but he was compelled to pay half the value to the charity as compensation for the injury.

Infant. Compromise.—In *Cross' Settlement* (1864), 10 L. T. 405, Stuart, V.C., sanctioned a compromise on behalf of an infant, as between him and the tenant for life, who held subject to a covenant to repair which he had not performed.

Special Trustees Dead.—In *Hewit v. H.* (1765), 2 Eden 232, Amb. 508, where there was power to cut with the consent of named trustees who had died, Northington, L.C., after having taken two years' time for consideration, ordered a reference to the Master to see what was fit to be cut.

Charity. Construction.—Trustees of land for a charity are not restricted like other trustees, but may cut timber and out of the proceeds buy other timber for repairing, "of the same species and denomination as the timber sold," and may cut on one part of an estate for repairs on another. *A. G. v. Geary* (1817), 3 Swans. 513, per Grant, M.R. Apparently they have the same powers as a prudent owner in fee. It was also held that a provision for cutting young trees for the better sale of underwood was meant to be permanent.

The Court does not readily interfere with trustees of

a charity established by Royal charter, except so far as concerns the application of revenue. *A. G. v. Foundling Hospital* (1793), 2 Ves. jun. 42.

By s. 21 of the Charitable Trusts Act, 1853, the Charity Commissioners may approve any lease by trustees or persons acting in the management of any charity, for mining, the cutting of timber, &c.

Construction. Power or Trust.—A power to cut timber was held not to be a trust in *Gower v. Eyre* (1815), Cooper 156.

Cessation of Power.—In *Silvester v. Bradley* (1842), 13 Sim. 75, a trust for cutting timber to be applied as the personal estate, which was settled, was held to cease on the inheritance in the land vesting in possession in an adult.

Trust or Implied Contract.—A devise of freeholds to A. for life, “she keeping the buildings thereon in good repair and committing no manner of w.,” does not raise a trust to repair, in which case the estate would be inalienable by the devisee, but merely an obligation which the Court will enforce. *Kingham v. Lee* (1846), 15 Sim. 396, Shadwell, V.C., differing from the language of Leach, V.C., in *Ormonde v. Kynnersley*, 5 Madd. 369; cf. *Woodhouse v. Walker* (1880), 5 Q. B. D. 404.

Powers Reconcilable.—In *Watlington v. Waldron* (1853), 4 D. M. G. 259, a term was given to trustees, without impeachment of w., in aid of personal estate and for payment of debts and legacies. There was an express prohibition of cutting timber until the second tenant for life, unimpeachable, should attain twenty-one, and then the trustees were to cut at discretion and pay the proceeds to her. They sold the term, and this was held validly done, and that the purchaser could cut timber; for the discretionary power was meant to apply only if the second

tenant for life attained twenty-one in the lifetime of the previous life tenant.

Assignment of Term.—In *Beaumont v. Salisbury* (1854), 19 Beav. 198, the trustees of a term, who were unimpeachable, conveyed the term without the words “without impeachment of w.,” but it was held that the assignee took without impeachment also. See p. 308, *supra*.

Which of Two Sets of Trustees have Powers.—Where there was a devise to trustees of a will to the same uses and upon the same trusts as affected certain estates under settlement, it was held that the powers of sale, exchange, cutting timber, &c., over the devised estates were in the trustees of the settlement. *Taylor v. Miles* (1860), 6 Jur. N. S. 1063.

Mortgage for Rebuilding.—A trustee with express power to repair out of rents, has no right to pull down and raise the money required for rebuilding by mortgage. Interest on the borrowed money was disallowed, and an inquiry directed as to the sum properly expended. *Fazakerley v. Culshaw* (1871), 24 L. T. 773, 19 W. R. 793.

Overriding Trusts.—Where the trustees had a long term for raising certain sums of money, in the first place by sale of timber, or by demising, mortgaging, or selling any part of the settled premises (except as therein mentioned), Truro, L.C., held that they had a discretion, and could raise the whole by sale of the timber, and that this was superior to the right of the life tenant sans w. *Kekewich v. Marker* (1851), 3 Mac. & G. 311. So in *Briggs v. Oxford* (1852), 1 D. M. G. 363, Cranworth and Knight Bruce, L.J.J., held that a power in trustees to discharge incumbrances through sales of timber, cut with the consent of the tenant for life, unimpeachable, overrode the power of the life tenant. See *Downshire v.*

Sandys, Davies v. Wescomb, pp. 308, 309, and "Without Impeachment," p. 153.

In *Bennett v. Wyndham* (1857), 23 Beav. 521, Romilly, M.R., held that a direction to pay annuities and charges out of the rents, issues, and profits, or by such other ways and means (except a sale or sales) as the trustees should think proper, justified the trustees in cutting timber for that purpose.

But in *Lovat v. Leeds* (1862), 2 Dr. & Sm. 75, a punishable life tenant was held entitled to the proceeds of timber as against trustees who were to pay off incumbrances out of rents and profits at the rate of £5,000 a year.

"Rents and profits" may mean "the estate" so as to give power to mortgage. *Londesborough v. Somerville* (1854), 19 Beav. 295, &c.

Notice of Trust.—A lessee taking with notice of an overriding trust-term may be restrained from committing w. under the powers in his lease, though this is not set aside. *Turkington v. Kearnan* (1835), Ll. & G. (Sugden) 35.

Perpetuity.—A trust for accumulation is only good if confined to the duration of a life or lives in being at the time of the instrument coming into operation and twenty-one years after. It is void and cannot be modelled, if any part exceeds this limit. See Lewin on Trusts, p. 90 (9th ed.). In *Ferrand v. Wilson* (1845), 4 Hare, at p. 373, &c., Wigram, V.C., held that an imperative trust to cut timber for the purposes of a settlement and to invest the surplus, after making certain payments, "until a tenant in tail should attain the age of twenty-one years—an event which might not occur for ages—perhaps never," is void, but he suggested that it might possibly be modelled so as to allow cutting within legal limits. Cf. *Floyer v. Bankes* (1869), 8 Eq. 115.

In *Briggs v. Oxford* (1852), 1 D. M. G. 363, C. A., there was a declaration of trust for A. for life, remainder for B. for life sans w., but subject to a power conferred on the trustees to fell timber and underwood for the purpose of discharging incumbrances, only to be exercised with the consent of B. if in enjoyment of the estates. This was held a trust overriding the legal power of B., and not void, because it could be ended, either by payment off of the incumbrances, or by barring the entail on B.'s son attaining twenty-one. *Ferrand v. Wilson* was much observed upon, and is of doubtful validity on this point, because a power in the trustees is always void as against a tenant in tail in possession, whether of full age or not, and the power so limited would be good. See "Infant" and "Tenant in Tail," pp. 273 and 158.

The Thellusson Act (39 & 40 Geo. 3, c. 98), which restricted the legal period of accumulation (see p. 361), does not apply to "any provision for the payment of debts of any grantor, settlor, or devisor, or other person or persons, or for raising portions for any child of the settlor or devisor, or any person taking an interest under the settlement or devise, or to any direction touching the produce of timber or wood."

TRUSTEES TO PRESERVE CONTINGENT REMAINDERS.

In consequence of 40 & 41 Vict. c. 33, following on 8 & 9 Vict. c. 106, these trustees will only be found in documents drawn before 1877, and not very frequently in those dating between 1845 and that year. It is sufficient here to note that if they join with the tenant for life in committing w., they are guilty of a breach of trust, *Gorges v. Pye* (1712), 7 Bro. P. C. 221; *Mansell v. M.* (1732), 2 P. Wms. 678, &c.; and that they can bring an action to stay w., *Garth v. Cotton* (1753), 1 W. & T. L. C.,

1 Dick. 183 ; *Lansdowne v. L.* (1815), 1 Madd. 116, 137 ; cf. *Birch-Wolfe v. Birch* (1870), 9 Eq. 683.

LEGAL PERSONAL REPRESENTATIVES.

General Principle. Profits of W.—It was debated in many cases whether the representatives of a waster are liable for his w., and if so, on what principle and to what extent. The leading case on the subject is the well-known *Hambly v. Trott* (1776), Cowper 371, where Lord Mansfield said : “Where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator by the work and labour or property of another, or a promise of the testator express or implied ; where these are the causes of action, the action survives against the executor. . . . Where . . . property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man’s trees, but for the benefit arising to his testator for the value or sale of the trees he shall.” This was followed by *Powell v. Rees* (1837), 7 Ad. & E. 426. An action had already been brought under 3 & 4 Will. 4, c. 42, s. 2, for the coal severed within six months of the testator’s death, and this fresh action was for the value of coal taken by him before that time, which was held maintainable as a separate action, though the second action might have covered the ground of the first, Denman, L.C.J., saying : “His personal estate has come to the hands of the defendant by so much increased ; and we cannot see any grounds why the same action is not to be maintained against her who represents him in respect of that estate.”

In *Winchester v. Knight* (1717), 1 P. Wms. 406, Cowper, L.C., had granted an account against an executor of a customary tenant who had opened a mine, a jury having negatived an alleged custom to open mines. And in *Sollers v. Lawrence* (1743), Willes 413, Willes, L.C.J., had held an executor liable for ecclesiastical dilapidations by his testator "as a duty which he ought to have performed." See "Implied Contract," *infra*, p. 320.

In *Garth v. Cotton* (1753), 1 W. & T. L. C., Hardwicke, L.C., held the representative of a colluding remainderman liable to refund the benefit received by his testator, and in *Ormonde v. Kynnersley* (1820), 5 Madd. 369, and *Lansdowne v. L.*, 1 ib. 140, 1 Jac. & W. 552, and *Leeds v. Amherst* (1846), 2 Phil. 117, the estates of the deceased were held liable for the amount derived from equitable w. In *Birch-Wolfe v. Birch* (1870), 9 Eq. 683, a decree was made for an admitted sum in respect of w. in timber, &c.

Trespasser. — *Phillips v. Homfray* (1883), 24 Ch. D. 439, C. A., decided that a trespasser who has no estate in the premises is similarly liable to account, Bowen, L.J., saying, in the judgment of the majority of the Court: "The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys. . . . The property or the proceeds or value which, in the lifetime of the wrongdoer, could have been recovered from him, can be traced after his death to his assets, and recaptured by the rightful owner there. . . . Where there is nothing

among the assets of the deceased that in law or in Equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain, the executors of a wrongdoer cannot be sued merely because it was worth the wrongdoer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby. . . . No action for w.—permissive or voluntary—as such, lies against the executors of a tenant for life. By non-repairing a house or by ploughing up ancient meadow, the tenant for life may have indirectly benefited himself or saved his own pocket. But neither law nor Equity recognise in this indirect benefit which he may have received any grounds for proceedings against his executors.”

Stale Demand.—Where a lessee had been committing w. in timber for forty-three years and an action was brought on that account against his executors six years after his death, Hart, L.C., refused an account against his estate on the ground of stale demand, raising a fair inference of a licence to fell, but an account and injunction was granted against the executors for w. since the death. *Fish-mongers' Co. v. Beresford* (1819), Beatty 607. See now the Statutes of Limitation, p. 357.

Actions by Executors. 4 Ed. 3, c. 7 (1330). — As to actions by executors for the benefit of the estate of their testator it may be useful to refer to the original statute which is still in force, though not often utilised, 4 Ed. 3, c. 7 (1330): “Whereas in times past executors have not had actions for a trespass done to their testators, as of the goods and chattels of the same testators carried away in their life, and so such trespasses have hitherto remained unpunished; it is enacted that the executors in such cases shall have an action against the trespassers, and

recover their damages in like manner, as they whose executors they be should have had if they were in life." Under this statute an action was successfully brought for carrying away wood, &c., though a count for felling the same could not be maintained. *Williams v. Breedon* (1798), 1 Bos. & P. 329, per Buller, J., and to the same effect is a dictum by Lord Kenyon in *Utterson v. Vernon* (1790), 3 Durn. & E. at p. 549, and see Wentworth's Off. Ex. It will be observed that there is no time limit in this statute.

3 & 4 Will. 4, c. 42 (1833).—Now by 3 & 4 Will. 4, c. 42, s. 2 (1833), it is enacted that the legal personal representatives of a deceased person may maintain an action "for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person; and the damages when recovered shall be part of the personal estate of such person." The same section proceeds to give an action for a wrong committed within six months of the death, the action to be commenced within six months of the representatives taking upon themselves administration.

Implied Contract. Damages.—An action for non-repair will lie against the representatives of a life tenant who holds on express condition of repairing. "The proper measure of damages is the sum which was reasonably necessary to put the premises in the state of repair in which the tenant for life ought to have left them," per Lush & Field, J.J., *Woodhouse v. Walker* (1880), 5 Q. B. D. 404, followed by *Bradbrook* (1887), 56 L. T. 106,

where the testator himself had not intended to keep all the premises in repair, per Kay, J. See *Sollers v. Lawrence* (1743), u.s., and *Batthyany v. Walford* (1887), 36 Ch. D. 269, C. A., where a similar obligation arising under foreign law in respect of foreign land was enforced, and the judgment here shows that all breaches of obligations to which tenants are liable *quasi ex contractu* may be remedied in actions against their legal personal representatives. It is clear that the liability for w. arises from implied contract, in spite of such cases as *Turner v. Buck* (1714), 22 Viner 523.

Covenant.—Of course an executor may sue his testator's lessee for breach of covenant not to stub up, lop, &c., timber trees excepted out of a demise, the breach occurred in the lessor's lifetime. *Raymond v. Fitch* (1835), 2 C. M. & R. 588.

Injunction against Heir.—Where there is no proof of fraud or that the debt is in danger, no injunction will be granted at the suit of a creditor to restrain the heir of his debtor from committing w. *Leake v. Beckett* (1827), 1 Y. & J. 339, per Alexander, L.C.B., but see *Partridge v. Pawlett* (1744), Ridgway 254.

Forfeiture.—A clause of forfeiture on committing w. will not prevent the remainderman from pursuing other remedies, if the forfeiture is not enforced. *Blake v. Peters* (1863), 1 De G. J. & S. 345, C. A.

ECCLESIASTICAL PROPERTY.

Cf. 8 Bacon 390, 22 Viner 434.

It is only intended to deal here with so much of the law affecting Church property as illustrates the doctrines of the Common Law by similarity or contrast. For fuller treatment the reader should consult the books by Burn, Cripps, Gibbons, Phillimore, &c.

Dilapidation.—Degge (118) defines dilapidation to be the pulling down or destroying in any manner any of the houses or buildings belonging to a spiritual living, or suffering them to run into ruin or decay, or wasting or destroying the woods of the Church, or committing or suffering any wilful w. in or upon the inheritance of the Church. It is not within the Statute of Marlbridge, 2 Inst. 151. *Garth v. Cotton* (1753), 1 W. & T. L. C.

Statute Ne Rector Prosternat (1307).—There are two statutes which are frequently referred to in the cases, and which should be mentioned here. The first is 35 Ed. 1, st. 2 (1307), *Ne rector prosternat*, &c., which after declaring trees in a churchyard to be Church property, proceeds: "The charge of them is committed only to priests to be disposed of. S. 2: And yet seeing those trees be often planted to defend the force of the wind from hurting of the church, we do prohibit the parsons of the Church, that they do not presume to fell them down unadvisedly, but when the chancel of the church doth want necessary reparations; neither shall they be converted to any other use, except the body of the church doth need like repair;

in which case the parsons of their charity shall do well to relieve the parishioners with bestowing upon them the same trees ; which we will not command to be done, but we will commend when it is done."

14 Eliz. c. 10 (1572).—The other statute is 14 Eliz. c. 10, s. 18, which enacted that money recovered for dilapidations was to be expended in repairs of the same houses within two years after receipt.

Who are Liable ?—Beside the bishop and parson, the following, among others, have been held liable for dilapidation :—a prebendary in respect of his prebendal house, *Radcliffe v. D'Oyly* (1788), 2 Durn. & E. 630, 1 R. R. 560 ; a vicar choral of a cathedral church, *Gleaves v. Parfitt* (1860), 7 C. B. N. S. 838 ; a perpetual curate, *Mason v. Lambert* (1848), 12 Q. B. 795 ; but not a curate who has neither been instituted nor inducted, *Pawly v. Wiseman* (1675), 3 Keble 614 ; nor is an incumbent liable where the Church lands are vested in trustees, *Browne v. Ramsden* (1818), 2 Moore 612, in which case the proof did not correspond with the declaration. As to the liability of a sequestrator, see *Hubbard v. Beckford* (1798), 1 Haggard 307 ; *Wingfield v. Watkins* (1812), 2 Phillimore 8.

To what Extent ? Damages.—The first successful civil case by an incumbent against his predecessor was the rather unsatisfactory case of *Jones v. Hill* (1691), 3 Levinz 268, which also decided that the damage recoverable was the cost of repair. This case has been constantly followed since. In addition to this remedy, substantial dilapidation was always a ground for deprivation in the spiritual Court.

The leading case is *Wise v. Metcalfe* (1829), 10 B. & C. 299, 5 Man. & R. 235, where it was held that an

incumbent is bound to maintain the parsonage and chancel in good and substantial repair "according to the original form, without addition or modern improvement." He is not bound to do any ornamental repair, such as white-washing, papering, or painting, unless necessary to preserve exposed timbers from decay.

"Every incumbent has his remedy against the prior incumbent, if alive, or his representatives, if dead, to recover so much money as will compensate for his default in not keeping the vicarage in a proper state of repair," and if successive incumbents have left the buildings out of repair, each has a remedy against each of the preceding, but, if he pleases, he may recover all against his immediate predecessor, who then has his remedy over. The existence of timber and stone, suitable for repairing, on the glebe land, would go in reduction of damages. *Bunbury v. Hewson* (1849), 3 Exch. 558. So if dilapidations have in fact been repaired with timber which the incumbent could have cut and so used in his lifetime, his executors will be allowed for this in estimating the liability of his estate. They are "bound to do nothing more than to restore what is actually in decay, and to make such repairs as are absolutely necessary for the preservation of the premises," *Percival v. Cooke* (1826), 2 C. & P. 460, per Best, C.J.

Exchange of Livings.—On an exchange of livings each parson can sue the other for dilapidations where the agreement is silent on the point. *Downes v. Craig* (1841), 9 M. & W. 166. An agreement to the contrary is not necessarily simoniacal and may be good. *Goldham v. Edwards* (1855), 16 C. B. N. S. 437, 17 ib. 141, 18 C. B. 389, followed in *Wright v. Davies* (1876), 1 C. P. D. 638, C. A., a case after the Ecclesiastical Dilapidations Act.

Trivial W.—Pulling down part of the wall of a chapel

yard for a temporary purpose, and rebuilding before action brought, is trivial w., and will not be punished in an Ecclesiastical Court. *Cox v. Ricraft* (1757), 2 Lee 373.

A rector is not liable for pulling down a farm building and substituting another in a more convenient situation, nor for removing a building not affixed to the soil. *Huntley v. Russell* (1849), 13 Q. B. 572.

Removing Unnecessary Buildings.—Where an incumbent erects unnecessary buildings, such as hothouses resting on brickwork, he may remove the whole on the ground that they are not fixtures, and that they were improper of erection, his and his executors' right in this latter particular exceeding the right of a tenant for life. *Martin v. Roe* (1857), 7 El. & Bl. 237.

Gates and Fences.—An incumbent must by the law and custom of England repair gates, fences, and hedges. *Young v. Munby* (1815), 4 Maule & S. 183; *Bird v. Relph* (1835), 2 A. & E. 773.

New Procedure.—The whole of the procedure for enforcing the reparation of ecclesiastical buildings, chancels, walls, and fences is now regulated by the Ecclesiastical Dilapidations Acts, 1871, c. 43, 1872, c. 96, which provide for the report by the diocesan surveyor and the proceedings subsequent to it.

Application of Capital Moneys.—The proceeds of surplus lands sold under the Land Tax Redemption Act (42 Geo. 3, c. 116, s. 100) cannot be applied in repairs or improvements of the vicarage. *Nether Stowey Vicarage* (1873), 17 Eq. 156, per Jessel, M.R., who doubted the cases where money arising from compulsory purchase had been applied in rebuilding or new buildings, viz., *Incumbent of Whitfield* (1861), 1 J. & H. 610; *Ex p. Rector of Skipton* (1871), 19 W. R. 549. See *supra*, p. 235.

Trees.—"It was holden in this case, that if a bishop, parson, or other ecclesiastical person do cut down trees upon the lands, unless it be for the reparations of their ecclesiastical houses, and do or suffer to be done any dilapidations," they may be punished by deprivation or by the Common Law; vide 2 H. 4, 3, cf. in *Bagg's Case* (1616), 11 Coke 98 *b*; *Bellamie's Case* (1616), 1 Rolle R. 255, for trees are "the dowry of the Church," *Knowle v. Harvey* (1616), 1 Rolle R. 335, 22 Viner 434. And Eyre, C.J., said in *Jefferson v. Durham* (1797), 1 Bos. & P. 105, "that the woods of bishops, and more especially of deans and chapters, including prebendaries, were a solid permanent and increasing fund of real property, devolved to them for the sustentation of the cathedrals, the palaces, and the houses of the Church." *Herring v. St. Paul, &c.* (1819), 3 Swans. at p. 509.

Lop and Top.—In spite of 35 Ed. 1, c. 2 (*supra*, p. 322), an incumbent is entitled to the loppings and toppings of trees in the churchyard, for this statute only applies to felling, and proceedings under it must be by indictment. *Cox v. Ricraft* (1757), 2 Lee 373.

Botes.—A rector may cut down timber for the repair of the parsonage house and the chancel, "likewise for repairing any old pews that belong to the rectory; and he is also entitled to botes for repairing barns and outhouses belonging to the parsonage," but not for any common purpose. *Strachy v. Francis* (1741), 2 Atk. 217, per Hardwicke, L.C. See p. 324. So (*Marlborough v. St. John* (1852), 5 De Gex & Sm. 174) a rector may only cut timber for woodwork repairs. He has no right to cut and sell for general repairs, except with the consent of the patron and ordinary. But if he sell and apply the proceeds in woodwork repairs no injunction will be granted against

him. As regards his successor, an incumbent is almost in the position of a tenant for life. Hardwicke, L.C., said in *Knight v. Mosely* (1752 c.), Ambler 176 : " Parsons may fell timber or dig stone to repair ; and they have been indulged in selling such timber or stone, where the money has been applied in repairs." And this judgment was approved by Eldon, L.C., in *Wither v. Winchester* (1817), 3 Mer. 421. In *Sowerby v. Fryer* (1869), 8 Eq. 417, James, V.C., recognised the right to cut for woodwork repairs, but not for accumulated dilapidations which ought to have been repaired long before. An injunction was granted and the defendant was ordered to pay the value of the timber into Court. It is doubtful whether the incumbents of churches built under the Acts regulating Queen Anne's Bounty or the Church Building Acts have any right to cut down trees in the churchyard. See *Craig upon Trees*, p. 101.

Tenants of Church Property.—Ecclesiastical persons, having themselves no power to appropriate timber, cannot enable their tenant to do so, even if the language of the lease is clear, which it was not in this case. *Herring v. St. Paul, &c.* (1819), 3 Swans. 492. To the same effect is *Winchester's Case* (1644), 1 Rolle R. 380, cited 2 Swans. 171, where a lessee sans w. of ecclesiastical lands was restrained from cutting all the trees towards the end of his lease " pro bono publico and in favour of the church whereof the king is patron." So *London v. Web* (1718), 1 P. Wms. 527, where a lessee sans w. was restrained from digging clay for making into bricks ; cf. *Winchester v. Wolgar* (1629), 3 Swans. 493 n. It should be remembered that every deed by the Crown is construed in favour of the grantor.

Order for Felling. Investment.—In a proper case the Court will order timber to be cut and the proceeds to be

invested for the benefit of the living. *Marlborough v. St. John* (1852), 5 De G. & Sm. 174.

As to investment of timber moneys, see 56 Geo. 3, c. 52 (1816).

Cultivation.—*St. Albans v. Skipwith* (1845), 8 Beav. 354, was a case in which a patron moved to restrain an incumbent from ploughing ancient meadow. It was by no means clear that the land was ancient meadow, but the Court did not proceed upon that in dissolving the injunction. Lord Langdale refused to apply to the case of an incumbent the rule which binds a tenant. "Lord Coke (Co. Lit. 341 a) says that "a parson or vicar for the benefit of the church and his successor, is, in some cases, esteemed by law to have a fee simple qualified; but to do anything to the prejudice of his successor, in many cases, the law adjudgeth him to have, in effect, but an estate for life;" and if, on the one hand, it be clear, that the parson or vicar is not entitled to use his glebe as an absolute owner may do, and that this Court will, at the instance of the patron, restrain him from doing various acts of w. or destruction, yet it seems, on the other hand, to be equally clear, that he is not to be considered merely as a lessee for years, or as a tenant for life under a will or settlement. And, considering his position, the question is, whether the act of ploughing up meadow infested with moss and weeds, for the purpose of laying it down again in grass when properly cleansed, is an act which, in such a case as this, the Court will restrain as w. Finding no authority upon the subject, thinking that the cases between landlord and tenant or between tenant for life and reversioner do not apply, and thinking that a law to prevent the amelioration of glebe lands, by such means, would probably be very injurious to the persons who are

successively, from time to time, to enjoy the possession of such lands, it appears to me that this injunction ought to be dissolved." And see *Bird v. Relph* (1835), 2 A. & E. 773. Upon consideration of the cases on ameliorating w. it would appear that this decision can also be supported on that general ground. See p. 135.

Mines.—An incumbent cannot open and work mines, *Knight v. Mosely* (1752 c.), Ambler 176, though perhaps he may with the consent of the patron and ordinary. *Holden v. Weekes* (1860), 1 J. & H. 278, per Page Wood, V.C.; cf. *Rutland v. Gie* (1662), 1 Sid. 152. But he may work mines already opened. *Knight v. Mosely*, u.s.

Where a gravel pit had been opened by order of the magistrates for the repair of the highway, sale therefrom by the incumbent to private persons is equivalent to an original opening and is w. The incumbent was held liable to refund, *Huntley v. Russell* (1849), 13 Q. B. 572. But the order to refund depended on the pleading, and was denied to be otherwise legal in *Ross v. Adcock* (1868), 3 C. P. 655, where it was stated that the estate of a deceased incumbent is only liable in a Civil Court to w. in buildings and fences. See p. 331.

There is no presumption of right in an incumbent to work coal, which has only been gotten by underground workings, though for about one hundred years. *Bartlett v. Phillips* (1859), 4 De G. & J. 414, C. A.

Sanction to Assurances.—The Ecclesiastical Commissioners have statutory power to sanction sales, exchanges, partitions, and leases of the estates of ecclesiastical corporations, aggregate or sole. (1843) 5 & 6 Vict. c. 108; (1858) 21 & 22 Vict. c. 57.

Injunctions.—A patron may obtain an injunction against the incumbent, *Bradley v. Strachy* (1740),

Barnardiston C. C. 399, *Knight v. Mosely* (1752 c.), Ambler 176, both per Hardwicke, L.C.; a prebendary or a bishop may be enjoined, *Acland v. Atwell* (1630), 3 Swans. 493 n.; *Winchester v. Wolgar* (1629), ib.; *Knight v. Mosely*, u.s., at the suit of the Attorney-General. See *Jefferson v. Durham* (1797), 1 Bos. & P. 131; *Fitzwilliam v. Moore* (1841), 3 Ir. Eq. R. 615.

Though an injunction may be obtained against an incumbent at the suit of the bishop or patron, the Court of Chancery does not interfere in the case of church and churchyard (generally), as the Ecclesiastical Courts have jurisdiction. An injunction was refused at the suit of a private person who sought to restrain an incumbent from erecting a school in a churchyard with the consent of the bishop. *Fitzwilliam v. Moore*, u.s.

Churchwardens may obtain an injunction against the incumbent, *Marriott v. Tarpley* (1838), 9 Sim. 279. This was explained, perhaps insufficiently, by Kay, J., in *Batten v. Gedye* (1889), 41 Ch. D. 507, as an instance of the Court of Chancery maintaining the *status quo* pending a suit in the Ecclesiastical Courts, which have no preventative jurisdiction.

In *Hoskins v. Featherstone* (1789), 2 Bro. C. C. 552, an injunction was granted against the widow of an incumbent, who was wasting during a vacancy.

A lessee of glebe lands has no more right to complain than a disinterested stranger. *Wither v. Winchester* (1817), 3 Mer. 421, per Eldon, L.C.

Prohibition.—A writ of prohibition of w. issued from the Queen's Bench to prevent w. during a quare impedit as at other times. *Prenry or Prenty v. Kent*, 2 Rolle Abr. 813, 22 Viner 434; *Knowle v. Harvey* (1616), 1 Rolle R. 335, 3 Bulst. 158.

Account.—It seems that no action for account will lie against an ecclesiastical person, *Knight v. Mosely*, u.s. ; *Holden v. Weekes* (1860), 1 J. & H. 278 ; *Crampton v. Meath* (1837), Sau. & Sc. 29, but in *Sowerby v. Fryer* (1869), 8 Eq. 417, James, V.C., expressed a doubt as to these decisions, and ordered the incumbent to pay the value of the timber cut into Court. See p. 329.

A clerk who has unsuccessfully claimed to be presented is liable for profits received under 1 Geo. 2, c. 23 (1728), *Crampton v. Meath*, u.s.

CONVEYANCE.

Licence.

Statute of Frauds.

CONVEYANCE.

Grant of Profit of Land. Whether Soil Passes (a).—In Co. Lit. 46 *b*, it is said: “If a man hath twenty acres of land, and by deed granteth to another and his heirs *vesturam terræ* . . . the land itself shall not pass, because he hath a particular right in the land; for thereby he shall not have the houses, timber trees, mines, and other real things parcel of the inheritance, but he shall have the vesture of the land, *i.e.*, the corn, grass, underwood, sweepage and the like. . . . The same law if a man grant *herbagium terræ*. . . . But if a man seised of lands in fee by his deed granteth to another the profit of those lands . . . the whole land itself doth pass; for what is the land but the profits thereof? . . . A man seised of divers acres of wood, grants to another *omnes boscos suos*, all his woods; not only the woods growing upon the land pass, but the land itself . . . for *boscus* doth not only include the trees, but the land whereupon they grow. The same law if a man in that case grant *omnes boscos suos crescentes*, &c.,

(a) The question whether the soil passes is important in view of the right to mines, to shoot and hunt, and in view of the Ground Game Act, 1880, c. 47, and in many other particulars.

yet the land itself shall pass, &c." And see Sheppard's Touchstone, 95.

Grant of Trees, &c.—In *Whilster v. Paslow* (1619), Cro. Jac. 487, "this difference was taken between the exception of wood and underwood, and the exception of all timber trees; for in the first, the soil itself of the wood and underwood and what is known by that name is excepted; but in the last case no soil is excepted; but only so much as is sufficient for the vegetation and growing of the trees excepted." And see Broke, Reservation, pl. 39; *Ive's Case* (1597), 5 Coke 11 *a*; *Hide v. Whistler* (1619), Popham 146; *Goodtitle v. Vivian* (1807), 8 East 190. *Rolls v. Rock*, noted in Selwyn's N. P. 1244, cannot be supported consistently with these cases.

Liford's Case (1615), 11 Coke 46 *b*, S.C., *Stampe v. Clinton*, 1 Rolle R. 95 is the leading authority, and here it was, among other things, decided that an exception of "all trees" does not except the soil, but only sufficient nutriment for the trees, and the profits of the trees, including the young of all birds that breed in the trees (but only so long as they are in the trees). In the reservation is included liberty to go on the land and show the trees to possible purchasers, and to enter for cutting and carrying away. So sawpits may be dug and the timber sawn into planks, but the trees must not be left an unreasonable time. *Hewitt v. Isham* (1851), 7 Exch. 77, see p. 344.

An exception of "all saleable woods" does not carry the soil, especially if coupled with a specific right of entry, *Pincomb v. Thomas* (1619), Cro. Jac. 524, as observed upon by Taunton, J., in *Legh v. Heald*, *infra*.

Special Points of Construction.—Where a lease was made of nineteen acres "excepting all timber and other trees, wood, underwoods," of which there were six acres, and a

special right of entry was given, it was held that "wood and underwoods" were intended as *ejusdem generis* with "timber and other trees," and that the soil did not pass. *Legh v. Heald* (1830), 1 B. & Ad. 622.

In an exception of "wood and underwood" all those trees are excepted which are known by the name of the wood, even though they are trees scattered in a park, but though conveyed under the name of "wood" the soil of such scattered trees is not excepted. *London, Bp. v. N—* (1523), Year Book, Mich. 1. Apple trees are not excepted because they are not known as "wood," *ib.*

A reservation (so called) of trees, mines, and quarries is in reality an exception. An exception of the *bodies* of trees leaves the tenant his ordinary rights to botes and shroud. *Doe v. Lock* (1835), 2 A. & E. 705.

A reservation of timber trees and great woods does not include underwood and herbage. *Anon.* (1553), Dyer 79 *a*, pl. 48. Cf. *Whilster v. Paslow*, u.s.

A conveyance of "all timber and timber-like trees then growing and being, and which should thereafter grow and be upon the estate" was construed to include even saplings and thinnings. *Gordon v. Woodford* (1859), 27 Beav. 603.

In a lease, excepting all woods and underwoods, a covenant that the lessee might take botes "on the afore-said premises" is confined to taking on the land actually demised. *Cage v. Paxlin* (1588), 1 Leonard 116.

A covenant to stand seised to the use of B. in fee, excepting that A. shall have the shrouds and loppings of timber trees for life, prevents B. from cutting any timber during A.'s life though he offer to leave sufficient estovers. *Tregmiell v. Reeve* (1636), Cro. Car. 437.

A lease of land and timber does not pass the property

in the timber, but the lessee has only fruit, shade, and botes. *Anon.* (1580), Dyer 374, pl. 18; *Billingsby v. Hercy* (1613), Moore 831, 2 Bulst. 5; *Liford's Case* (1615), 11 Coke 46 b; *Herring v. St. Paul, &c.* (1819), 3 Swans. at p. 511.

“A termor cannot grant away his term, excepting the trees, but the exception is void, for that he cannot have a distinct interest in them, but only relative to the land.” *Udal v. U.* (1649), Aley 81; 2 Rolle Abr. 119, 454. But a grant of part of the term, or a lease for years by a tenant for life, may contain such an exception. 2 Rolle Abr. 454; 2 Inst. 302. The law is the same with respect to an exception of mines, *Saunders' Case* (1599), 5 Coke 12 a; cf. *Lushford v. Sanders* (1599), Cro. Eliz. 690, where there was a proviso in a lease that the lessor might enter and cut trees.

In Ireland the plantings of the tenant are protected by the Timber Acts, the last of which was 23 & 24 Geo. 3, c. 39 (1783). *Galwey v. Baker* (1840), 7 Cl. & Fin. 379.

A grant of woods “as they have been accustomedly used to be fallen” was held to carry one fall only in *Gower v. Andrews* (1561), Moore 15, pl. 57, nom. *Glover v. Andrew*, 1 Anderson 7, pl. 15.

A grant by copy of underwood in a wood, annually to cut four or five acres at least, carries the whole interest in the underwood. *Hoe v. Taylor* (1584), Moore 355, Cro. Eliz. 413, 4 Coke 30, Co. Lit. 58.

An absolute grant of all woods in a manor, will not be restricted by subsequent words or covenants. *Stukeley v. Butler* (1615), Hobart 168.

A covenant not to commit w. in excepted trees will be construed by analogy, as strictly w. can only be in the tenement. (See *Anon.* (1537), Dyer 19 a, pl. 110; *Barret*

v. *B.* (1634), Hetley 36.) Such a covenant will be reconciled with a liberty to quarry, which involves the cutting of some trees. *Doe v. Price* (1849), 8 C. B. 894.

A covenant to leave a wood at the end of the term in the same condition as he found it, is broken by the lessee cutting during the term, see citation in *Englefield's Case* (1591), 7 Coke 15; *Mayne's Case* (1596), 5 Coke 21.

As to a lease of a house, or wood, or mine, coupled with a grant to make the best profit out of it, see 8 Bacon 413, 414.

Profits à Prendre.—A grant or licence to take profits from land is not exclusive, unless clearly so expressed. *Huntingdon v. Mountjoy* (1583), 4 Leonard 147, Godbolt 17, 1 And. 308; *Chetham v. Williamson* (1804), 4 East 469; *Newby v. Harrison* (1861), 1 J. & H. 393, 3 De G. F. & J. 287. So the reservation of a right of mining is not exclusive in England, *Sutherland v. Heathcote* (1892), 1 Ch. 475, C. A., but otherwise in Scotland, *Hamilton v. Dunlop* (1885), 10 A. C. (Sc.) 813. But a licensor must not by subsequent acts derogate from his grant, *Newby v. Harrison*, u.s., unless at the time of the grant he was ignorant of the purpose and extent of the business requirements of the licensee. *Carr v. Benson* (1868), 3 Ch. 524.

One who has an exclusive right may take away thorns, &c., though severed by another, *Dowglass v. Kendal* (1610), Cro. Jac. 256, in which case the claim was by prescription, which is good both against the owner and his licensee.

"If a man grant to another to dig turves in his land and to carry them at his will and pleasure, the land shall not pass, because but part of the profit is given." Co. Lit. 4 *b*, and *supra*, p. 332.

A profit à prendre is indivisible in the grantee, *Huntingdon v. Mountjoy*, u.s., but being a licence of profit and not of mere personal pleasure, a man may take it by his servants as well as in person. *Wickham v. Hawker* (1840), 7 M. & W. 63. A grant of hunting, &c., for personal pleasure would not give the right to take away the game killed. See "Injury to Sporting Rights," *supra*, p. 251.

By 22 & 23 Vict. c. 35, s. 1, a licence to do any act extends only to the permission actually given, and does not further affect any stipulation against doing such or other acts, and by s. 2 does not operate in favour of any co-owner or co-lessee of the actual licensee.

Statute of Frauds.—A contract for the sale of timber, &c., in process of falling, or to be felled, by the vendor, is a contract for sale of severed trees, and is not an interest in land within s. 4, but is within s. 17 (b), *Smith v. Surman* (1829), 9 B. & C. 561. But a contract for sale of *fructus naturales* to be severed by the purchaser, is within s. 4, whether of growing grass, as in *Crosby v. Wadsworth* (1805), 6 East 602, cf. *Barrington v. Roots* (1837), 2 M. & W. 248; of growing underwoods, as in *Scorell v. Boxall* (1827), 1 Young & J. 396, cf. *Teall v. Auty* (1820), 4 Moore 542, 2 Brod. & B. 100; of fruits, as in *Rodwell v. Phillips* (1842), 9 M. & W. 501 (c); but a contract for sale of *fructus industriales* is not within s. 4, *Evans v. Roberts* (1826), 5 B. & C. 829, 8 D. & R. 611; *Jones v. Flint* (1839), 10 A. & E. 753, 2 P. & D. 594.

(b) By the Sale of Goods Act, 1894, c. 71, this section is repealed, but is replaced by s. 4 of the new Act, which is to the same effect, excepting an additional sub-section as to what constitutes acceptance of goods.

(c) *Marshall v. Green* (1875), 1 C. P. D. 35, is in conflict with these cases, and was distinguished by Chitty, J., in *Lavery v. Pursell* (1888), 39 Ch. D. 508.

All the English and American cases were exhaustively discussed in *Owens v. Lewis* (1874), 15 Am. R. 295, where the same conclusions were arrived at, and where also it was held that a parol sale operated as a licence to enter, and excused what would otherwise be a trespass, and at p. 320 : " A parol agreement for the sale of growing trees, the trees to be severed and taken from the land by the vendee, as in this case, will amount to a licence for the vendee to enter upon the vendor's land, for the purpose of making such severance, and if such licence is not revoked before the trees are severed, the title to the trees will vest in the vendee, and the licence after severance will become coupled with an interest and irrevocable, and the vendee will have a perfect right to enter and remove the trees thus severed ; but if, before the trees are severed, the vendor should revoke such licence, no title will pass to the vendee, and no rights will vest by virtue of such contract."

PRACTICE.

Injunction.

Receiver.

Account.

INJUNCTION.

By the Judicature Act, 1873, s. 25, sub-s. 8, it is provided that "An injunction may be granted by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just; and if an injunction is asked, either before or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended w. or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is, or is not, in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable."

Who can obtain Injunction.—Any person with sufficient estate in reversion or remainder can institute proceedings to stay w.; thus, the following, among others, may do so—trustees to preserve contingent remainders, *Garth v. Cotton* (1753), 1 W. & T. L. C., *Lansdowne v. L.* (1815), 1 Madd. 116, 137; a tenant for life in remainder, *Dayrell v. Champneys* (1700), 1 Eq. Ca. Abr. 400, *Perrot*

v. *P.* (1744), 3 Atk. 94, *Davies v. Leo* (1802), 6 Vesey 784, *Birch-Wolfe v. Birch* (1870), 9 Eq. 683; a remainderman, though there is an intermediate life estate, *Anon.* (1598), Moore 554, *Anon.* Cary 27 & (1603) 36; a jointress, *Lady Evelyn's Case*, cited 2 Swans. 172 n.; a contingent executory devisee, *Robinson v. Litton* (1744), 3 Atk. 209; a ground landlord against an under-lessee, *Farrant v. Lovel* (1750), ib. 723, Anderson 105; a mesne remainderman, *Mollineux v. Powell* (1730), 3 P. Wms. 268; a remainderman in fee or tail, *Paget's Case*, *P. v. Cary* (1583), 5 Coke 76 b, *Roswell's Case* (1619), 1 Rolle Abr. 377, *Tracy v. T.* (1681), 1 Vern. 23.

Insufficiency of Interest.—But if the reversion is too remote, the damage being therefore trivial, no injunction would be granted. See *Strother v. Barr* (1828), 5 Bingham at p. 153, and other cases under “Trivial W.,” p. 125. And see *McLaughlin v. Long* (1820), 5 Harris & Johnson 113; *Baxter v. Taylor* (1832), 4 B. & Ad. 72, 1 N. & M. 13; cf. *Bacon v. Smith* (1841), 1 Q. B. 345.

No injunction can be granted when the estate and interest of the waster has terminated before action. *Jesus College v. Bloome* (1745), 3 Atk. 262; *Elias v. Griffith* (1878), 8 Ch. D. at p. 534, C. A.; *Birch-Wolfe v. Birch* (1870), 9 Eq. 683.

W. Committed or Threatened.—In order to ground an injunction, w. must be either in process of commission or threatened, *Potts v. P.* (1825), 3 L. J. 176, and no injunction will be granted although some w. has been committed, unless it appears that future w. is intended, *Doran v. Carroll* (1860), 11 Ir. Ch. 379, *Anon.* (1773), Lofft. 151. A disclaimer of present intention, coupled with an assertion of a right to commit w., is a sufficient threat, *Gibson v. Smith* (1741), 2 Atk. 182, Barn. 491; *Hext v. Gill* (1872), 7 Ch. 699, C. A. Of course no action for

damages will lie for mere threatened w. *Leach v. Thomas* (1837), 2 M. & W. 427, 7 C. & P. 327.

A defendant, who admits w. before bill filed, cannot get an injunction dissolved merely on proof that he has done none since, *A. G. v. Burrows* (1747), 1 Dickens 128, 3 Atk. 485; and the continued working of minerals after bill filed gives a right to injunction and damages, though the minerals are exhausted before the hearing, *A. G. v. Tomline* (1877), 5 Ch. D. 750.

Evidence of Title and W.—The affidavit must be positive as to title, information and belief being insufficient, *Davies v. Leo* (1802), 6 Vesey 784, and the particular title, not a mere general allegation, must be set out, *Whitelegg v. W.* (1779), 1 Bro. C. C. 57; and as to meadow being ancient, see *Creagh v. Carmichael* (1844), 7 Ir. Eq. 334. But an original mistake as to title of plaintiff will not relieve an unsuccessful defendant from paying the costs, *A. G. v. Tomline*, u.s. So the proof of the w. must be clear and positive, *Strathmore v. Bowes* (1786), 2 Dick. 673, *De Salis v. Crossan* (1809), 1 Ball & B. 188, 12 R. R. 12 (cutting turves for sale and not for estovers), cf. *Hannay v. McEntire* (1805), 11 Vesey 54 (threat); but where the danger is pressing, an *ex parte* injunction may be granted on mere hearsay evidence, *Beere v. Head* (1844), 7 Ir. Eq. 60.

An injunction will not be granted where it is doubtful whether the defendant has a right to w. or not, *Field v. Jackson* (1782), 2 Eden 599, *Lowe v. Lucy* (1838), 1 Ir. Eq. 93, or whether the acts amount to w., *Lyon v. Wilkinson* (1823), 1 L. J. Ch. 155.

On proof of one kind of w. the Court will not enjoin against all or any other kinds of w., though it might do no harm to the defendant. *Coffin v. C.* (1821), Jacob 70, C. A.

No injunction will be granted against meliorating w., *Doherty v. Allman* (1878), 3 A. C. 709, nor where there is no substantial damage to the inheritance, *Meux v. Cobley* (1892), 2 Ch. 253.

Ex Parte.—An *ex parte* injunction will not be granted unless mischief is imminent, *Collard v. Cooper* (1821), 6 Madd. 190; in which case it will be, *Browne v. Duffy* (1889), 24 L. R. Ir. 13, where the defendant was removing subsoil and endangering the landlord's neighbouring lands. Appearance the day before motion day will not prevent an *ex parte* injunction in a proper case, *Aller v. Jones* (1809), 15 Vesey 605.

Other Remedies Available.—An injunction will be granted to prevent the removal of timber wrongfully cut, though trover lies for it, *Anon.* (1790), 1 Ves. jun. 93; *Smith v. Cooke* (1746), 3 Atk. 378. A covenant or condition to repair does not prevent an injunction against voluntary or permissive w., *London, &c., v. Hedger* (1810), 18 Vesey 355; *Caldwall v. Baylis* (1817), 2 Mer. 408. So an injunction may be granted against a copyholder taking turves, though the forfeiture is not waived, *Richards v. Noble* (1807), 3 Mer. 673, but see *Blake v. Peters* (1863), 1 D. J. S. 345, C. A.; but no discovery will be ordered unless forfeiture is waived, *A. G. v. Vincent* (1724), Bunbury 192, Gilbert 235, 2 Eq. Ca. Ab. 378.

Parties.—In *A. G. v. Ancaster* (1737), 1 Dick. 68, an injunction was granted against a tenant in possession, who was not a party. But the actual wasters must be parties. No injunction will be granted against a lessee who is not himself wasting. *Norbury v. Alleyne* (1838), 1 Dr. & Walsh 337. The absence of persons who may be benefited is no objection. *Const. v. Harris* (1824), Turner & R., p. 514; *Harris v. Coppinger* (1827), 1 Hogan 478.

Acquiescence.—No injunction will be granted in favour

of a man who lies by and sees another expend his capital and labour upon any work without giving notice or attempting to interrupt him. *Parrott v. Palmer* (1834), 3 My. & K. at p. 640.

Preservation pending Action.—The Court will by injunction preserve property pending an action, *Lathropp v. Marsh* (1800), 5 Vesey 259; *Wright v. Atkyns* (1813), 1 V. & B. 313; *White v. Nowlan* (1817), 1 Hogan 21; *Anwyl v. Owens* (1853), 22 L. J. Ch. 995. Likewise the Court will preserve property as to which it is premature to take a decree, and in giving liberty to cut timber will require security or payment into Court. *Wright v. Atkyns* (1823), Turner & R. 143.

Against Heir.—In *Leake v. Beckett* (1827), 1 Y. & J. 339, Alexander, L.C.B., refused an injunction at the suit of a creditor to prevent the heir of the debtor committing w., there being no proof of fraud or that the debt was in danger. It had been granted in *Partridge v. Pawlett* (1744), Ridgway 254, by Hardwicke, L.C.

Procedure where no Account Asked.—Where no account is sought or insisted on, the action should not be brought to a hearing, but the interlocutory injunction should be made perpetual on notice to the defendant. *Dunsany v. Dunne* (1864), 15 Ir. Ch. 278.

Costs.—Where no account is prayed of the proceeds of w. which has been or would be profitable to the waster, the successful plaintiff is seldom given his costs. *Chatterton v. White* (1839), 1 Ir. Eq. 200, *sed qu.*

Infant.—An injunction will be granted in favour of an unborn infant, *Lutterell's Case*, cited in *Hale v. H.*, Prec. Ch. 50; and in *Robinson v. Litton* (1744), 3 Atk. 209, Lord Hardwicke said he should not shrink from granting it; and see *Wallis v. Hodson* (1740), 2 Atk. 115, Barn. Ch. 272. A devise to children "living" at a

certain date, does not include a child *en ventre sa mère*. *Musgrave v. Parry* (1715), 2 Vern. 710, &c. So no proceeding can be maintained on its behalf. See "Infant," p. 271 to p. 277.

Lunatic.—It seems that an injunction may be granted on a motion intituled, "In the matter of —, a person, &c.," without an action being brought. *Chinnery* (1844), 6 Ir. Eq. R. 469, 1 J. & L. 90. See "Lunatic," p. 277 to p. 283.

Purchaser.—A purchaser who has not paid his purchase money may be restrained from cutting timber, for even if mere trespass will not be restrained, w. will. *Crockford v. Alexander* (1808), 15 Vesey 138; cf. *Rawlins v. Burgis* (1814), 2 V. & B. 382, at p. 387; *Marshall v. Watson* (1858), 25 Beav. 501. A purchaser under a decree, who has been ordered to pay purchase money or deliver up possession, may be restrained without being made a party, for by purchasing he has submitted to the jurisdiction of the Court. *Casamajor v. Strobe* (1823), Sau. & Sc. 381.

A purchaser with notice of w. can only complain of continuing or future w.; in this case where land had been converted into a cemetery, he had an injunction as to future burials. *Cregan v. Cullen* (1865), 16 Ir. Ch. 339.

An injunction in favour of a purchaser will be granted *ex parte* in a pressing case. *Beere v. Head* (1844), 7 Ir. Eq. 60.

Purchasers of timber which the tenant for life is restrained by injunction from selling are not necessary parties, but the plaintiff must cover their claims against the defendant in his undertaking and security. *Marker v. M.* (1851), 9 Hare 1.

A purchaser of timber must remove it within a reasonable time. *Hoit v. The Stratton Mills* (1873), 20 Am. R. 119; cf. *Hewitt v. Isham* (1851), 7 Exch. 77.

Innocent Lessee.—No injunction will be granted at the instance of a life tenant who has made a lease to the defendant, which operates as a forfeiture of his life estate, for he cannot disaffirm his own grant. *Wentworth v. Turner* (1795), 3 Vesey 3; cf. *Keogh v. Collins* (1834), Hayes & J. 805.

Partners.—The plaintiff and defendant were partners, and the defendant had agreed to pay the plaintiff one-half the whole value of the partnership property, had taken possession, and had begun to pull down part of the buildings, but had not paid; an injunction was refused, the proper remedy being account and payment. *Croften v. Horner* (1818), 5 Price 537; cf. *Norway v. Rowe* (1812), 19 Vesey at p. 155, *Marshall v. Watson* (1858), 25 Beav. 501.

INJUNCTION AGAINST TRESPASS.

Dispute as to Title.—In cases where there is a dispute as to legal title the principle of the Court has been not to interfere against the possessor in the absence of privity of estate, unless he is perpetrating acts of spoliation, such as pulling down a mansion house or stripping an estate of its timber. *Talbot v. Hope Scott* (1858), 4 K. & J. 96, at p. 133; *Beatty v. B.* (1826), 2 Molloy 541.

In *Neale v. Cripps* (1858), 4 K. & J. 472, an injunction was granted to prevent an estate being stripped of timber in such a way that it could not be referred to any fair acts of ownership. In *Fingal v. Blake* (1828), 2 Molloy 542, an injunction was granted at the instance of the trustees of the will against the heir, who claimed under a resulting trust. See *Hanson v. Gardiner* (1802), 7 Vesey, at p. 308. And in *Stonor v. Strange* (1767), Mitford's Pl. 137, "where the tenants of a manor, claiming

a right of estovers, cut down a great quantity of growing timber of great value, their title being doubtful, the Court of Chancery entertained a bill at the suit of the lord of the manor to restrain this assertion of it."

Crops.—No injunction will be granted against cutting holly bushes and underwood as a crop, as damages would be sufficient remedy. *A. G. v. Hallett* (1847), 16 M. & W. 569.

Minerals.—The taking of minerals is an act of destruction, and will be restrained, *Mitchell v. Dors* (1801), 6 Vesey 147; *Cowper v. Baker* (1810), 17 Vesey 128; *Grey v. Northumberland*, ib. 282; *Greenwich Hospital v. Blackett* (1848), 12 Jurist 151; but with extreme reluctance, from the great inconvenience it occasions, *Anon.* (1754), Ambler 209; and in *Lowther v. Stamper* (1747), 3 Atk. 496, it was refused by Lord Hardwicke before answer.

Generally.—The previous decisions were all carefully considered by Kindersley, V.C., in *Lowndes v. Bettle* (1863), 33 L. J. Ch. 451 (a), where he stated his conclusions as follows: "The difficulty arises (in part, no doubt) from the very considerable change which has taken place in the views of this Court on the subject of granting injunctions to restrain injury to property, and from the fact that the Court will now do what in the time of Lord

(a) Followed in *Stanford v. Hurlstone* (1873), 9 Ch. 116. The following were the decisions considered: *Hamilton v. Worsefold* (1786), 10 Vesey 290; *Pilsworth v. Hopton* (1801), 6 Vesey 51; *Crockford v. Alexander* (1808), 15 Vesey 138; *Jones v. J.* (1817), 3 Mer. 161; *Haigh v. Jaggar* (1845), 2 Coll. 231; *Davenport v. D.* (1849), 7 Hare 217; *Talbot v. Hope Scott* (1858), 4 K. & J. 96; *Neale v. Cripps* (1858), 4 K. & J. 472; *Fingal, L. v. Blake* (1829), 2 Molloy 542; *Lloyd v. Trimleston, L.* (1829), ib. 81; *Mogg v. M.* (1803), 2

Dick. 670; *Mortimer v. Cottrell* (1789), 2 Cox 205; *Mitchell v. Dors* (1801), 6 Vesey 147; *Courthope v. Mapplesden* (1804), 10 Vesey 289; *Cowper v. Baker* (1809), 17 Vesey 128; *Robinson v. Byron, L.* (1785), 1 Bro. C. C. 588; *Grey v. Northumberland* (1809), 13 Vesey 236, 17 Vesey 281; *Thomas v. Oakley* (1811), 18 Vesey 184; and see *Sandys v. Murray* (1838), 1 Ir. Eq. R. 29, *Wrierson v. Condran* (1839), ib. 380, cases of trespass in cutting turf, long continued and not causing irreparable damage.

Thurlow and the earlier days of Lord Eldon, it would not have done. . . . I have gone into this case at great length, because of the difficulty of finding the principle upon which to act ; I should say, however, that it is this : where a defendant is in possession, and a plaintiff claiming possession seeks to restrain him from committing acts similar to those here complained of (cutting sods and felling a few trees by way of claiming title), the Court will not interfere, unless, indeed (as in *Neale v. Cripps*), the acts amount to such flagrant instances of spoliation as to justify the Court in departing from that general principle. Where the plaintiff is in possession, and the person doing the acts complained of is an utter stranger, not claiming under the colour of right, then the tendency of the Court is not to grant an injunction, unless there are special circumstances, but to leave the plaintiff to his remedy at law, though where the acts tend to the destruction of the estate, the Court will grant it. But where the person in possession seeks to restrain one who claims by an adverse title, the tendency of the Court will be to grant the injunction, at least when the acts done either do or may tend to the destruction of the estate."

Excessive User of Legal Right.—Where the trespass consisted in exceeding a legal right, an injunction was granted, as here the offence closely resembled *w.*, which was always restrained. *Thomas v. Oakley and Courtown v. Ward* (1802), 1 Sch. & L. 8 ; *Rochdale Canal Co. v. King* (1851), 2 Sim. N. S. 78.

Continuing Trespass.—And a continuing trespass may be restrained, *Goodson v. Richardson* (1874), 9 Ch. 221. "The jurisdiction of the Court by injunction in cases of trespass is in aid of the legal right. The Court interferes on the assumption that the party who makes the application has the right which he asserts, but needs

the interference of the Court for the protection of the property from irreparable damage pending the trial of the right. If the right at law is clear, and the breach of that right is clear, and serious damage is likely to arise to the plaintiff if the defendant is allowed to proceed with what he is doing or threatens to do, or has given notice of doing, an injunction will be granted pending the trial of the right (*b*). If the case is in the opinion of the Court free from doubt, the Court may interfere at once without putting the plaintiff to establish his right, and grant a perpetual injunction (*c*). But if the right at law is not clear, or the breach is doubtful, and no irreparable injury can arise to the plaintiff pending the trial of the right, the case resolves itself into a question of comparative convenience and inconvenience, whether the defendant will be more damnified by the injunction being granted, or the plaintiff by its being withheld." Kerr on Injunction, p. 116.

In *Leeds, &c., Co. v. Horsefall* (1889), 33 Sol. J. 183, where the defendant was in possession of fishing and sporting rights over certain lands and a reservoir, the C. A. held that the principle that a person in possession was not to be ousted by injunction, unless the acts complained of amounted to flagrant spoliation, as laid down in *Lowndes v. Bettle*, u.s., is still the law.

Magistrate's Precept to Restrain W.—By the Landlord and Tenant (Ireland) Act, 23 & 24 Vict. c. 154, s. 35, "where any person shall be in possession of lands, or of any dwelling-house, outhouse, or buildings, as tenant thereof, or as a servant or caretaker of any owner, or having obtained the possession thereof from any such tenant,

(*b*) *Clowes v. Beck* (1851), 13 Beav. 451; *Allen v. Martin* (1875), 20 Eq. 347.

(*c*) *Lowndes v. Bettle*, 33 L. J. Ch. 466.

servant, or caretaker, and the landlord or owner or other person interested in the preservation of the premises, or any agent acting on his behalf, shall, by affidavit, satisfy any Justice of the Peace of the county, not being a party interested in the said premises (who is hereby authorised and required to take such affidavit), that there exist probable and just grounds of suspicion that such person is about to commit or to permit or suffer any unlawful w., injury, alteration, destruction upon, or removal from any such dwelling-house, outhouse, or other building, or intends unlawfully to burn or break up any part of the soil or surface or subsoil of the lands, or unlawfully to remove the soil or surface or subsoil of the said lands, or unlawfully to cut down, top, lop, or grub any trees, woods, or underwoods growing on the said lands, or otherwise use or misuse the premises or any part thereof, contrary to his agreement, or that he is in the act of doing or suffering any of the aforesaid matters, it shall be lawful for such Justice of the Peace to issue his precept in writing under his hand and seal, stating that information had been received that such w. or injury is intended to be or is in the act of being done or permitted, and commanding all such persons and all other persons whomsoever to desist from such w. or injury, and not to continue the same until special leave and authority for that purpose shall be first procured from the magistrate who shall have signed such precept, or until the subject matter of the said information be inquired into at the next Petty Sessions of the district in which the said premises are situate, or such other time as may be therein mentioned; and such precept may be according to the Form No. 1 in the Schedule (A.) to this Act annexed, and shall be served on every or any person by whom it shall be suspected that such w. or injury is intended to be or is being committed, by delivering a copy thereof to such

person, if he can be found, and if not, by affixing a copy thereof on the principal door or entrance to the dwelling-house, outhouse, or other building, and if there be no such house or building, on some conspicuous part of the premises ; and the said persons shall and may attend at the Petty Sessions, and such order may be made thereat by the Court of Petty Sessions for annulling or continuing for a limited period the said precept, or otherwise, as may be agreeable to justice."

RECEIVER.

A receiver will not readily be appointed when an adverse legal claim is made against the possessor. *Clark v. Dew* (1829), 1 Russell & M. 103 ; *Fingal v. Blake* (1828), 2 Molloy 50.

After an order for the appointment of a receiver, it is wrong for any party to cut timber, &c. *Hunter v. Nockolds* (1846), 15 L. J. Ch. 320. For special powers granted to receivers in the management of estates, see Seton on Decrees, pp. 669–676. As to w. by receiver, see *Bays v. Bird* (1726), 2 P. Wms. 397. As to the jurisdiction to appoint receiver, see Judicature Act (1873), s. 25 (8), *supra*, p. 339.

A receiver may apply for inquiry as to proper proceedings, and for an injunction. *Nangle v. Fingall* (1824), 1 Hogan 142 ; *Cooke v. C.* (1826), *ib.* 182 ; *Cronin v. McCarthy* (1840), Flan. & K. 49 ; *Mason v. M.* (1841), *ib.* 429.

ACCOUNT.

Old Rule.—As a general rule no account would formerly be granted except in cases where the Court can also grant an injunction ; for originally the additional remedy of

account was given to prevent the necessity of the plaintiff bringing an action at law for damages as well as the suit in Equity for the injunction. *Jesus Coll. v. Bloome* (1745), 3 Atk. 262, Amb. 54, per Lord Hardwicke; cf. *Pulteney v. Warren* (1801), 6 Vesey, at p. 89; *Grierson v. Eyre* (1804), 9 Vesey, at p. 346; *Parrott v. Palmer* (1834), 3 Myl. & K. 632. Account would also lie as incident to discovery. *Whitfield v. Bewit* (1724), 2 P. Wms. 240, 2 Eq. Ca. 589 (d).

Exceptions.—The first exception to the rule was made where the waster had died, and so the remedy for trespass had gone with him, and here account without injunction was granted against his representatives; but afterwards account and injunction were granted together against a defendant whether there was privity of estate or not. *Thomas v. Oakley* (1811), 18 Vesey 184, per Lord Eldon, and *Courtoun v. Ward* (1802), 1 Sch. & L. 8.

However, in *Higginbotham v. Hawkins* (1872), 7 Ch. 676, James & Mellish, L.J.J., held that no account would lie against the executrix of a tenant for life as no injunction could be granted. But this latter decision appears at variance also with *Seagram v. Knight* (1867), 2 Ch. 628, where Chelmsford, L.C., granted an account under similar circumstances, and with all those cases in which legal personal representatives have been held liable to account for profits wrongfully made by the deceased. See p. 317.

Another exception was made in cases where there was no legal remedy, as in *Garth v. Cotton* (1750), 1 Dick. 183, where Lord Hardwicke said: "From the whole it may be collected that although as to timber there exists con-

(d) Thurlow, L.C., had, however, said in *Lee v. Alston* (1789), 3 Bro. C. C. 37: "If a party cuts timber on an estate on which he is not entitled so to do, it will draw an account."

siderable discrepancy, yet the sound rule is to make account the incident and not the principal, where there is a remedy at law. . . . The plaintiff here, though greatly damnified, can have no remedy at law, which is a substantial difference."

Another exception exists in the case of mines, where account may be had although no injunction is possible. *Garth v. Cotton, Parrott v. Palmer, Whitfield v. Bewit, &c.*, u.s.

Thus in *Winchester v. Knight* (1717), 1 P. Wms. 406, Cowper, L.C., directed an account against the executor of a customary tenant who had opened mines without any right by custom.

Present Rule.—Since 1 November, 1875, the Courts of Equity have had full jurisdiction to grant damages, and an account will be given in Equity, not as a substitute for damages in a Common Law action, but as an alternative to the assessment of damages in the same Court. Jud. Act (1873), c. 66, s. 24.

Minerals.—One who mines under an invalid lease must account for the mineral at its fair market value in the district, as if he were purchaser of the mines, all expenses of raising and hewing being allowed. But he must pay for any other damage occasioned by working the mines and for way-leave. *Jegon v. Vivian* (1871), 6 Ch. 742, per Hatherley, L.C.; approved in *Livingstone v. Rawyards, &c.* (1880), 5 A. C. 25, where the owner of a small and unprofitable bed of coal was held entitled as against an innocent trespasser, who was working the surrounding mines, only to the same rate of royalty as was paid for the latter, as this was the value of the coal to the owner at the time it was taken; he was also entitled in respect of damage to the surface. And see *A. G. v. Tomline* (1880), 15 Ch. D. 150, C. A. ;

Wright v. Pitt (1870), 12 Eq. 408; *G. W. R. v. Rous* (1870), 4 H. L. 650.

No Profit. Mortgagees.—Where the tortious acts have not been attended with profit, the Court will not grant an account, but will leave the damages to a jury, or rather will assess the damages itself or grant a reference for the same purpose. Mortgagees without notice cannot be held accountable for receiving the proceeds of coal gotten by the trespass of their mortgagor in possession, but only for what they themselves obtain when in possession. *Powell v. Aiken* (1858), 4 K. & J. 343.

Where mortgagees have injured the property by working contrary to the covenants, they will not be allowed more than the cost of bringing to the surface, excluding the cost of severance. *Taylor v. Mostyn* (1886), 33 Ch. D. 226, C. A. See *Phillips v. Homfray* (1892), 1 Ch. 465. And so where they have opened mines without authority; *Hood v. Easton* (1856), 2 Jur. N. S. 729, following *Thorneycroft v. Crockett* (1848), 16 Sim. 445.

Trifling Profit.—Account will not be directed against a defendant who has only received trifling royalties and has parted with his interest before action brought, never having taken any active part in the alleged w. *Elias v. Griffith* (1878), 8 Ch. D. at p. 534, C. A.

In *Morris v. M.* (1858), 3 De G. & J. 323, Knight Bruce & Turner, L.J.J., refused an account of profit made by pulling down a mansion, as no proof was given that any of the materials had been sold, and there was evidence that all of any value had been employed in rebuilding, the only benefit received by the tenant for life being in the enjoyment of the old materials in a new position.

Ornamental Trees.—In *Rolt v. Somerville* (1737), 2 Eq. Ca. Abr. 759, Lord Hardwicke refused a life tenant

in remainder sans w. an account of ornamental timber cut by the unimpeachable life tenant in possession. But in *Bedoyère v. Nugent* (1890), 25 L. R. Ir. 143, the Court would have decreed an account if the remainderman had been a party. The number of trees felled was small. In *Newry v. Kilmorey* (1870), 24 L. T. N. S. 15, Bacon, V.C., ordered the defendant to set out the accounts before the preliminary question had been decided as to whether the trees were ornamental or not.

Improvements Made.—No relief will be given against the estate of a life tenant who was also remainderman in fee on the ground of collusion between the two characters, if he has laid out in permanent improvements substantially as much as the value of the proceeds of the w. *Birch-Wolfe v. Birch* (1870), 9 Eq. 683.

Difficulty in Accounting.—In *Leeds v. Amherst* (1850), 20 Beav. 239, there was great difficulty in ascertaining what the tenant for life had received, and the Master somewhat arbitrarily found that the sum of £42,000 was due from his estate, and this was upheld by Shadwell, V.C., in a judgment that will well repay perusal, based as it is upon the principles of abstract justice. The defendants had been putting the plaintiffs to proof of everything “upon such mere book-keeping, vile shop notions as these—that they are to be charged nothing except what can actually be made out.”

As to account v. “legal personal representatives,” see p. 317. As to procedure and costs where no account is asked or ordered, see *supra*, p. 343.

Interest.—In *Bagot v. B.* (1863), 32 Beav. at p. 519, Romilly, M.R., said: “After a long time has elapsed before the bill has been filed, the Court has usually endeavoured

to deal with the tenant for life in a very liberal manner, considering, and as I think justly considering, that in most cases it would not be for the benefit of the parties concerned to go into a long and expensive inquiry as to the nature of the timber cut and the circumstances under which it was cut. If this be a correct view as regards timber, it is manifest that the same consideration would apply to the getting of mineral, when there is such a complication of circumstances as exists in the present case, arising from the difficulty of deciding which were opened and which were unopened mines," and so on, p. 522. Interest was given from the death of the tenant for life instead of an inquiry as to the date of the w. In *Leeds v. Amherst*, u.s. (1846), 2 Phillips 117, interest was decreed at £4 per cent., Cottenham, L.C. In *Garth v. Cotton* (1753), 1 W. & T. L. C., interest was given from the filing of the bill.

In *Phillips v. Homfray* (1892), 1 Ch. 465, C. A., where the representatives of a deceased trespasser were held liable to account for the benefit received by him, interest was refused on the ground of laches, the original decree, made in 1870, saying nothing about it. The Court approved of *Garth v. Cotton* and *Leeds v. Amherst*, but reserved an opinion as to whether interest should be paid from the date of severance in cases of equitable w.

Impounding.—"It seems to me, upon a principle well established, that if there had been no question except between (the tenant for life) and the remainderman, and he were a tenant for life in receipt of the rents and profits, the persons entitled in remainder and in the inheritance would have had a right to come to the Court to have the amount that is due ascertained, the rents of the estate impounded, and the injury made good to the remainder-

men, so as to recoup the inheritance"; and Stuart, V.C., decided that this right is valid as against the incumbrancers of the tenant for life, who acquired their interest before w. committed. *Briggs v. Oxford* (1855), 1 Jur. N. S. 817.

In *Ferguson v. F.* (1885), 17 L. R. Ir. 552, C. A., an order was made for recoupment by instalments.

See Trustee Act, 1893, c. 53, s. 45, and Lewin upon Trusts, 9th ed., 1042.

DEFENCE OF DELAY.

The Statutes of Limitation.

Laches and Acquiescence.

THE STATUTES OF LIMITATION (a).

Run from W.—It was decided by the Court of Appeal (James and Mellish, L.J.J.), in *Higginbotham v. Hawkins* (1872), 7 Ch. 676, that the right of action accrues when the w. is committed and not at the death of the tenant for life, or other termination of the limited interest, “at which time the reversioners might have brought their action for money had and received”; cf. *Denys v. Shuckburgh* (1840), 4 Y. & C. 42. A similar decision by Chelmsford, L.C., is *Seagram v. Knight* (1867), 2 Ch. 628. In Equity as well as at law the statute begins to run from the commission of the w. per Chatterton, V.C., in *Simpson v. S.* (1879), 3 L. R. Ir. 308. And see *Morris v. M.* (1858), 3 De G. & J. 323, 6 W. R. 427, 4 Jur. N. S. 964. These cases sufficiently show that *Leeds v. Amherst* (1846), 2 Ph. 117 (1858), would not be followed in this respect where the statute is pleaded.

Exceptions.—Where the waster is both tenant for life and owner of the first estate of inheritance, the statute runs from his death, before which time there is no one to sue. The time, as in all the above cases except *Leeds v.*

(a) By the Limitation of Actions Bill, H. L. 39, it is proposed to limit actions for civil wrong, other than those questioning the title to real estate, to one year. See Appendix, p. 395.

Amherst, is six years. *Birch-Wolfe v. Birch* (1870), 9 Eq. 683, per James, V.C. Of course the usual exceptions of disability obtain.

An account will be ordered beyond the six years where the defendant has already rendered an account beyond that time. *Hony v. H.* (1824), 1 Sim. & St. 568.

Trustees, &c.—Executors innocently cutting timber on a supposed trust are entitled to rely on the statute as if they had been strangers. *Ferrand v. Wilson* (1845), 4 Hare, at p. 383. The result would be otherwise if they were proved to have acquired some benefit for themselves or were impeachable for fraud. In this case the trust was void as infringing the rule against perpetuities, and account against the estate of the life tenant was limited to six years from filing the bill.

Trustee Act, 1888.—Now by the Trustee Act, 1888, c. 59, s. 8, trustees may plead the statutes of limitation, unless parties to fraud or benefiting by the breach of trust, but the statute does not run against a beneficiary until his interest is in possession. *Re Page* (1893), 1 Ch. 304.

Laches and Acquiescence.—Where the time for bringing an action at law is limited by statute, Equity follows the law by refusing its aid in actions brought outside the limit. *Lockey v. L.* (1719), Prec. Ch. 518; *Hovenden v. Annesley* (1806), 2 Sch. & Lef. 607. And where no statute of limitations applies directly or by analogy, Equity refuses to act if the demand is stale and the plaintiff has been guilty of laches, *Harcourt v. White* (1860), 28 Beav. 303, where in reality the demand for account was barred by analogy to 21 James 1, c. 16, s. 3, through the lapse of six years.

The neglect to enforce known rights by a person not under disability is evidence of a release of those rights.

Leeds v. Amherst (1846), 2 Ph. 117. And see generally *Garth v. Cotton* (1750), 1 W. & T. L. C.; *Smith v. Clay* (1767), 3 Bro. C. C. 639 n.; *Browne v. McClintock* (1873), 6 H. L. 456; *Gibson v. Doeg* (1857), 2 H. & N. 615.

Where a plaintiff has lain by and allowed the defendant to expend money upon works, the Court of Equity will leave him to his legal remedy. *Parrott v. Palmer* (1834), 3 Myl. & K. 643, per Brougham, L.C.

The Court will not aid by injunction a claimant by legal title who is out of possession, unless he has been prompt, *Talbot v. Hope Scott* (1858), 4 K. & J. 96, and in *Jones v. J.* (1817), 3 Mer. 161, Grant, M.R., refused to restrain a devisee, at the suit of the heir, especially as the w. had been committed soon after the testator's death, since which two years and a half had elapsed. For in such a case there is no w., but trespass, *Smith v. Collyer* (1803), 8 Vesey 89. And a legal remainderman for life cannot obtain an injunction where the w. is trivial and the plaintiff dilatory in applying for aid. *Barry v. B.* (1820), 1 Jac. & W. 651.

"After a long time has elapsed before the bill has been filed, the Court has usually endeavoured to deal with the tenant for life in a very liberal manner." *Bagot v. B.* (1863), 32 Beav. at p. 519, on appeal 33 L. J. Ch. 122 n. But "if a man has allowed half his trees to be cut down before he applied, the Court would not therefore allow the remaining half to be cut down:"—an *obiter dictum* by Page Wood, V.C., in *A. G. v. Eastlake* (1853), 11 Hare, at p. 228; and "because trespasses have been committed by a termor by the abstraction of minerals from the demised property, such trespasses do not create a right to commit further trespasses of the same character,"

Elias v. Griffiths (1878), 8 Ch. D. 521; cf. *Courtoun v. Ward* (1802), 1 Sch. & Lef. 8. Where mines are reserved, mere lapse of time will not raise a presumption of grant in favour of the owner of the surface who innocently works them. *Adair v. Shaftoe*, cited in the judgment of *Norway v. Rowe* (1812), 19 Vesey 156. In *Fishmongers' Co. v. Beresford* (1819), Beatty 607, an account was refused of reserved trees cut during forty-three years by the tenant, but was granted with an injunction against his executors for w. since his death.

Interest was refused in *Phillips v. Homfray* (1892), 1 Ch. 465, C. A., on the ground of laches, the original decree, made in 1870, having been silent on the point.

The fact that a lessor carries away trees, wrongfully cut by a lessee, does not preclude his bringing his action for w. (8 Bacon 413, Broke W. 39), though it would affect the amount of damages.

APPENDIX OF STATUTES.

THELLUSSON ACT.

39 & 40 GEO. 3, c. 98.

“No person or persons shall, after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits, or produce thereof, shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settlor or settlors, or the term of twenty-one years from the death of any such grantor, settlor, devisor, or testator, or during the minority or respective minorities of any person or persons who shall be living, or in ventre sa mere at the time of the death of such grantor, devisor, or testator, or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurances, directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce, so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed.

“(2) Provided always, and be it enacted, that nothing in this Act contained shall extend to any provision for payment of debts of any grantor, settlor, or devisor, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settlor, or devisor, or any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands or tenements, but that all such provisions and directions shall and may be made and given as if this Act had not passed.”

23 & 24 VICT. c. 153 (IR. 1860).

A.D. 1860. **Improvements (Ireland).**—By the Tenure and Improvement of Land Act, ss. 10 & 11, any limited owner may with the sanction of the Landed Estates Court (a) execute on settled estates certain improvements in which are included :

“(6) Erection of farm buildings, houses for stewards, labourers, or other persons employed in superintending the cultivation of or in cultivating land, or of other buildings for farm purposes ;

“(7) The renewal or reconstruction of any of the foregoing works, or such alterations therein or additions thereto as are not required for maintaining the same, and increase durably their value.”

By ss. 36 & 37 a tenant of land may upon complying with certain provisions, execute improvements, including

“(6) The erection of farmhouse or any building for agricultural purposes suitable to the holding, or the enlarging or the extending of any such farmhouse or building erected or to be erected thereon, so as to render the same more suitable to the holding ;

“(7) The renewal or reconstruction of any of the foregoing works, or such alterations therein or additions thereto as are not required for maintaining the same, and increase durably their value.”

Leases by Limited Owner.—By s. 25 of the same Act a limited owner may, with certain sanctions, grant building leases, or may grant agricultural leases without sanction. “Every agricultural lease shall imply the following covenants on the part of the lessee: (1) To manage, till, and use the lands demised in due and regular course of good husbandry, so that the same be not in anywise injured or deteriorated ; (2) Not to burn, or permit to be burned, any part of the soil or surface of the lands demised, without the previous consent in writing of the landlord.”

IMPROVEMENT OF LAND ACT, 1864.

27 & 28 VICT. c. 114.

A.D. 1864. **Improvements Authorised.**—By this Act any landowner (b) may apply to the Land Commissioners to sanction improvements and to charge the land for the sum advanced for the cost thereof. By s. 9 the improve-

(a) Now merged in the Supreme Court, 40 & 41 Vict. c. 57.

(b) “Landowner” is defined by s. 8, and broadly speaking means a person

in actual receipt of the rents or profits of the land, not being a leaseholder for lives unrenovable nor for less than twenty-five unexpired years.

ments include: (8) The erection of labourers' cottages, farmhouses, and other buildings required for farm purposes, and the improvement of and addition to labourers' cottages, farmhouses, and other buildings for farm purposes already erected, so as such additions or improvements be of a permanent nature; (9) Planting for shelter; (10) The constructing or erecting of any engine-houses, water-wheels, saw and other mills, kilns, shafts, wells, tanks, reservoirs, &c.; and by 33 & 34 Vict. c. 56 this a. was extended to building and improvement of mansions, by 40 & 41 Vict. c. 31 to water supply; by s. 30 of the Settled Land Act, 1882, all the improvements sanctioned by that Act are added (see p. 378); and 56 & 57 Vict. c. 34 (S.) incorporated "the planting of trees and woods." The amount to be expended extends to two years' rental of the whole estate. See *Dunn's S. E.* (1877), W. N. 39.

Protection from Impeachment of W., &c.—By s. 34, "Every provisional or modifying order shall be a full authority to the landowner or successive landowners and their representatives in the respective cases hereinbefore defined, and to all persons employed by or under contract with him or them respectively, to enter upon the lands to be improved, and any adjoining or neighbouring lands acquired or authorised to be entered under either of the two last preceding sections, and to execute in and on the same, without impeachment of w. by any remainderman or reversioner, all the improvements sanctioned by the same order according to the specifications and plans or drawings approved by the Commissioners, and to do, execute, and use all such acts, works, and conveniences as may be proper for making, maintaining, and using such improvements; and for the purpose of effecting any improvement under this or the recited Acts it shall be lawful to get freestone, limestone, clay, sand, and any other mineral or substance out of the land to be improved or charged, and to make tramroads and other ways, and to burn and make bricks, tiles, and other things to be used in effecting such improvements, and also for the same purpose to cut down and use any timber or trees not planted or serving for shelter or ornament."

THE SETTLED ESTATES ACT, 1877.

40 & 41 VICT. c. 18.

Power to the Court of Chancery to authorise Leases.—By s. 4 it is A.D. 1877 enacted that "It shall be lawful for the Court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in

A.D. 1877. — this Act contained, to authorise leases of any settled estates, or of any rights or privileges over or affecting any settled estates, for any purpose whatsoever, whether involving w. or not, providing the following conditions be observed :

"First. Every such lease shall be made to take effect in possession at or within one year next after the making thereof, and shall be for a term of years not exceeding for an agricultural or occupation lease, so far as relates to estates in England twenty-one years, or so far as relates to estates in Ireland thirty-five years, and for a mining lease or a lease of water-mills, way-leaves, water-leaves, or other rights or easements forty years, and for a repairing lease sixty years, and for a building lease ninety-nine years : Provided always, that any such lease (except an agricultural lease) may be for such term of years as the Court shall direct, where the Court shall be satisfied that it is the usual custom of the district and beneficial to the inheritance to grant such a lease for a longer term than the term hereinbefore specified in that behalf ;

"Secondly. On every such lease shall be reserved the best rent or reservation in the nature of rent, either uniform or not, that can be reasonably obtained, to be made payable half-yearly or oftener without taking any fine or other benefit in the nature of a fine : Provided always, that in the case of a mining lease, a repairing lease, or a building lease, a peppercorn rent or any smaller rent than the rent to be ultimately made payable may, if the Court shall think fit so to direct, be made payable during all or any part of the first five years of the term of the lease ;

"Thirdly. Where the lease is of any earth, coal, stone, or mineral, a certain portion of the whole rent or payment reserved shall be from time to time set aside and reserved as hereinafter mentioned, namely, when and so long as the person for the time being entitled to the receipt of such rent is a person who by reason of his estate or by virtue of any declaration in the settlement is entitled to work such earth, coal, stone, or mineral for his own benefit, one fourth part of such rent, and otherwise three fourth parts thereof ; and in every such lease sufficient provision shall be made to ensure such application of the aforesaid portion of the rent by the appointment of trustees or otherwise as the Court shall deem expedient ;

"Fourthly. No such lease shall authorise the felling of any trees except so far as shall be necessary for the purpose of clearing the ground for any buildings, excavations, or other works authorised by the lease ;

"Fifthly. Every such lease shall be by deed, and the lessee shall execute a counterpart thereof, and every such lease shall contain a condition for re-entry on non-payment of the rent for a period of twenty-eight days after it becomes due, or for some less period to be specified in that behalf."

Sales of Estates and Timber.—S. 16: “It shall be lawful for the Court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this Act contained, from time to time to authorise a sale of the whole or any parts of any settled estates or of any timber (not being ornamental timber) growing on any settled estates, and every such sale shall be conducted and confirmed in the same manner as by the rules and practice of the Court for the time being is or shall be required in the sale of lands sold under a decree of the Court.” A.D. 1877.

Saving.—S. 39: “Nothing in this Act shall be construed to empower the Court to authorise any lease, sale, or other act beyond the extent to which in the opinion of the Court the same might have been authorised in and by the settlement by the settlor or settlors.”

By s. 40, acts of the Court in professed pursuance of these powers are valid.

CONVEYANCING AND LAW OF PROPERTY ACT, 1881.

44 & 45 VICT. c. 41.

LEASES OF MORTGAGED PROPERTY.

A.D. 1881.

18.—(1.) A mortgagor of land while in possession shall, as against every incumbrancer, have, by virtue of this Act, power to make from time to time any such lease of the mortgaged land, or any part thereof, as is in this section described and authorised. Leasing powers of mortgagor and of mortgagee in possession.

(2.) A mortgagee of land while in possession shall, as against all prior incumbrancers, if any, and as against the mortgagor, have, by virtue of this Act, power to make from time to time any such lease as aforesaid.

(3.) The leases which this section authorises are—

(i.) An agricultural or occupation lease for any term not exceeding twenty-one years; and

(ii.) A building lease for any term not exceeding ninety-nine years.

(4.) Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf.

(5.) Every such lease shall be made to take effect in possession not later than twelve months after its date.

(6.) Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken.

A.D. 1881. (7.) Every such lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

(8.) A counterpart of every such lease shall be executed by the lessee and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall, in favour of the lessee and all persons deriving title under him, be sufficient evidence.

(9.) Every such building lease shall be made in consideration of the lessee, or some person by whose direction the lease is granted, having erected, or agreeing to erect within not more than five years from the date of the lease, buildings, new or additional, or having improved or repaired buildings, or agreeing to improve or repair buildings, within that time, or having executed, or agreeing to execute, within that time, on the land leased, an improvement for or in connexion with building purposes.

(10.) In any such building lease a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or any less part of the term.

(11.) In case of a lease by the mortgagor, he shall, within one month after making the lease, deliver to the mortgagee, or, where there are more than one, to the mortgagees first in priority, a counterpart of the lease duly executed by the lessee; but the lessee shall not be concerned to see that this provision is complied with.

(12.) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease if granted would be binding.

(13.) This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and shall have effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained.

(14.) Nothing in this Act shall prevent the mortgage deed from reserving to or conferring on the mortgagor or the mortgagee, or both, any further or other powers of leasing or having reference to leasing; and any further or other powers so reserved or conferred shall be exercisable, as far as may be, as if they were conferred by this Act, and with all the like incidents, effects, and consequences, unless a contrary intention is expressed in the mortgage deed.

(15.) Nothing in this Act shall be construed to enable a mortgagor or mortgagee to make a lease for any longer term or on any other conditions than such as could have been granted or imposed by the mortgagor, with the concurrence of all the incumbrancers, if this Act had not been passed.

(16.) This section applies only in case of a mortgage made after A.D. 1881. the commencement of this Act; but the provisions thereof, or any of them, may, by agreement in writing made after the commencement of this Act, between mortgagor and mortgagee, be applied to a mortgage made before the commencement of this Act, so, nevertheless, that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement.

(17.) The provisions of this section referring to a lease shall be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting.

Sale ; Insurance ; Receiver ; Timber.

19.—(1.) A mortgagee, where the mortgage is made by deed shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely) : Powers incident to estate or interest of mortgagees.

- (i.) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby ; and
- (ii.) A power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money ; and
- (iii.) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof ; and
- (iv.) A power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale, to be completed within any time not exceeding twelve months from the making of the contract.

A.D. 1881. (2.) The provisions of this Act relating to the foregoing powers, comprised either in this section, or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this Act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained.

(4.) This section applies only where the mortgage deed is executed after the commencement of this Act.

Regulation
of exercise
of power
of sale.

20. A mortgagee shall not exercise the power of sale conferred by this Act unless and until—

- (i.) Notice requiring payment of the mortgage money has been served on the mortgagor, or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or
- (ii.) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or
- (iii.) There has been a breach of some provision contained in the mortgage deed or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.

Convey-
ance, re-
ceipt, &c.,
on sale.

21.—(1.) A mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold, for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage; except that, in the case of copyhold or customary land, the legal right to admittance shall not pass by a deed under this section, unless the deed is sufficient otherwise by law, or is sufficient by custom, in that behalf.

(2.) Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case has arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorised, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

(3.) The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into Court under this Act of a sum to meet any prior incumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses, properly incurred by him, as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof. A.D. 1881.

(4.) The power of sale conferred by this Act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money.

(5.) The power of sale conferred by this Act shall not affect the right of foreclosure.

(6.) The mortgagee, his executors, administrators, or assigns, shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by this Act or of any trust connected therewith.

(7.) At any time after the power of sale conferred by this Act has become exercisable, the person entitled to exercise the same may demand and recover from any person, other than a person having in the mortgaged property an estate, interest, or right in priority to the mortgage, all the deeds and documents relating to the property, or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover from him.

22.—(1.) The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by this Act, or for any money or securities comprised in his mortgage, or arising thereunder; and a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage. Mortgagee's receipts, discharges, &c.

(2.) Money received by a mortgagee under his mortgage or from the proceeds of securities comprised in his mortgage shall be applied in like manner as in this Act directed respecting money received by him arising from a sale under the power of sale conferred by this Act; but with this variation, that the costs, charges, and expenses payable shall include the costs, charges, and expenses properly incurred of recovering and receiving the money or securities, and of conversion of securities into money, instead of those incident to sale.

A.D 1882.

SETTLED LAND ACT, 1882 (E. & I.).

45 & 46 VICT. c. 38.

II.—DEFINITIONS.

Definition
of settle-
ment,
tenant for
life, &c.

2.—(1.) Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires.

(2.) An estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is for purposes of this Act an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement.

(3.) Land, and any estate or interest therein, which is the subject of a settlement, is for purposes of this Act settled land, and is, in relation to the settlement, referred to in this Act as the settled land.

(4.) The determination of the question whether land is settled land, for purposes of this Act, or not, is governed by the state of facts, and the limitations of the settlement, at the time of the settlement taking effect.

(5.) The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement.

(6.) If, in any case, there are two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for purposes of this Act.

(7.) A person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent.

(8.) The persons, if any, who are for the time being, under a settlement, trustees with power of sale of settled land, or with power of consent to or approval of the exercise of such a power of sale, or if under a settlement there are no such trustees, then the persons, if any,

for the time being, who are by the settlement declared to be trustees A.D. 1882. thereof for purposes of this Act, are for purposes of this Act trustees of the settlement.

(9.) Capital money arising under this Act, and receivable for the trusts and purposes of the settlement, is in this Act referred to as capital money arising under this Act.

(10.) In this Act—

(i.) Land includes incorporeal hereditaments, also an undivided share in land; income includes rents and profits; and possession includes receipt of income:

(ii.) Rent includes yearly or other rent, and toll, duty, royalty, or other reservation, by the acre, or the ton, or otherwise; and, in relation to rent, payment includes delivery; and fine includes premium or foregift, and any payment, consideration, or benefit in the nature of a fine, premium, or foregift:

(iii.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings; and a building lease is a lease for any building purposes or purposes connected therewith.

(iv.) Mines and minerals mean mines and minerals whether already opened or in work or not, and include all minerals and substances in, on, or under the land, obtainable by underground or by surface working; and mining purposes include the sinking and searching for, winning, working, getting, making merchantable, smelting or otherwise converting or working for the purposes of any manufacture, carrying away, and disposing of mines and minerals, in or under the settled land, or any other land, and the erection of buildings, and the execution of engineering and other works, suitable for those purposes; and a mining lease is a lease for any mining purposes or purposes connected therewith, and includes a grant or licence for any mining purposes:

(v.) Manor includes lordship, and reputed manor or lordship:

(vi.) Steward includes deputy steward, or other proper officer, of a manor:

(vii.) Will includes codicil, and other testamentary instrument, and a writing in the nature of a will:

(viii.) Securities include stocks, funds, and shares:

(ix.) Her Majesty's High Court of Justice is referred to as the Court:

(x.) The Land Commissioners for England as constituted by this Act are referred to as the Land Commissioners:

(xi.) Person includes corporation.

A.D. 1882.

IV.—LEASES.

General Powers and Regulations.

Power for tenant for life to lease for ordinary or building or mining purposes. **6.** A tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding—

(i.) In case of a building lease, ninety-nine years :

(ii.) In case of a mining lease, sixty years :

(iii.) In case of any other lease, twenty-one years (c).

Regulations respecting leases generally.

7.—(1.) Every lease shall be by deed, and be made to take effect in possession not later than twelve months after its date.

(2.) Every lease shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case.

(3.) Every lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

(4.) A counterpart of every lease shall be executed by the lessee and delivered to the tenant for life ; of which execution and delivery the execution of the lease by the tenant for life shall be sufficient evidence.

(5.) A statement, contained in a lease or in an indorsement thereon, signed by the tenant for life, respecting any matter of fact or of calculation under this Act in relation to the lease, shall, in favour of the lessee and of those claiming under him, be sufficient evidence of the matter stated.

Building and Mining Leases.

Regulations respecting building leases.

8.—(1.) Every building lease shall be made partly in consideration of the lessee, or some person by whose direction the lease is granted, or some other person, having erected, or agreeing to erect, buildings, new or additional, or having improved or repaired, or agreeing to improve or repair, buildings, or having executed, or agreeing to execute, on the land leased, an improvement authorised by this Act, for or in connexion with building purposes.

(2.) A peppercorn rent or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years or any less part of the term.

(3.) Where the land is contracted to be leased in lots, the entire amount of rent to be ultimately payable may be apportioned among the lots in any manner ; save that—

(c) See S. L. Act, 1890, s. 7, p. 393.

- (i.) The annual rent reserved by any lease shall not be less than ten A.D. 1882. shillings; and
- (ii.) The total amount of the rents reserved on all leases for the time being granted shall not be less than the total amount of the rents which, in order that the leases may be in conformity with this Act, ought to be reserved in respect of the whole land for the time being leased; and
- (iii.) The rent reserved by any lease shall not exceed one fifth part of the full annual value of the land comprised in that lease with the buildings thereon when completed.

[By the Settled Land Act, 1892, c. 36, s. 2, any building lease, and any agreement for granting building leases, under the Settled Land Act, 1882, may contain an option, to be exercised at any time within an agreed number of years not exceeding ten, for the lessee to purchase the land leased at a price fixed at the time of the making of the lease or agreement for the lease, such price to be the best which having regard to the rent reserved can reasonably be obtained, and to be either a fixed sum of money or such a sum of money as shall be equal to a stated number of years' purchase of the highest rent reserved by the lease or agreement.

3. Such price when received shall for all purposes be capital money arising under the Settled Land Act, 1882.]

9.—(1.) In a mining lease (d)—

- (i.) The rent may be made to be ascertainable by or to vary according to the acreage worked, or by or according to the quantities of any mineral or substance gotten, made merchantable, converted, carried away, or disposed of, in or from the settled land, or any other land, or by or according to any facilities given in that behalf; and
- (ii.) A fixed or minimum rent may be made payable, with or without power for the lessee, in case the rent, according to acreage or quantity, in any specified period does not produce an amount equal to the fixed or minimum rent, to make up the deficiency in any subsequent specified period, free of rent other than the fixed or minimum rent.

(2.) A lease may be made partly in consideration of the lessee having executed, or his agreeing to execute, on the land leased, an improvement authorised by this Act, for or in connexion with mining purposes.

10.—(1.) Where it is shown to the Court with respect to the district in which any settled land is situate, either—

(d) See S. L. Act, 1890, s. 8, p. 393.

A.D. 1882.

—
or mining
lease
according
to circum-
stances of
district.

- (i.) That it is the custom for land therein to be leased or granted for building or mining purposes for a longer term or on other conditions than the term or conditions specified in that behalf in this Act, or in perpetuity ; or
- (ii.) That it is difficult to make leases or grants for building or mining purposes of land therein, except for a longer term or on other conditions than the term and conditions specified in that behalf in this Act, or except in perpetuity ;

the Court may, if it thinks fit, authorise generally the tenant for life to make from time to time leases or grants of or affecting the settled land in that district, or parts thereof, for any term or in perpetuity, at fee-farm or other rents, secured by condition of re-entry, or otherwise, as in the order of the Court expressed, or may, if it thinks fit, authorise the tenant for life to make any such lease or grant in any particular case.

(2.) Thereupon the tenant for life, and, subject to any direction in the order of the Court to the contrary, each of his successors in title being a tenant for life, or having the powers of a tenant for life under this Act, may make in any case, or in the particular case, a lease or grant of or affecting the settled land, or part thereof, in conformity with the order.

Part of
mining
rent to be
set aside.

11. Under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, there shall be from time to time set aside, as capital money arising under this Act, part of the rent as follows, namely,—where the tenant for life is impeachable for waste in respect of minerals, three fourth parts of the rent, and otherwise one fourth part thereof, and in every such case the residue of the rent shall go as rents and profits.

Special Powers.

Leasing
powers for
special
objects.

12. The leasing power of a tenant for life extends to the making of—

- (i.) A lease for giving effect to a contract entered into by any of his predecessors in title for making a lease, which, if made by the predecessor, would have been binding on the successors in title ; and
- (ii.) A lease for giving effect to a covenant of renewal, performance whereof could be enforced against the owner for the time being of the settled land ; and
- (iii.) A lease for confirming, as far as may be, a previous lease, being void or voidable ; but so that every lease, as and when confirmed, shall be such a lease as might at the date of the original lease have been lawfully granted, under this Act, or otherwise, as the case may require.

Surrenders.

A.D. 1882.

13.—(1.) A tenant for life may accept, with or without consideration, a surrender of any lease of settled land, whether made under this Act or not, in respect of the whole land leased, or any part thereof, with or without an exception of all or any of the mines and minerals therein, or in respect of mines and minerals, or any of them.

Surrender and new grant of leases.

(2.) On a surrender of a lease in respect of part only of the land or mines and minerals leased, the rent may be apportioned.

(3.) On a surrender, the tenant for life may make of the land or mines and minerals surrendered, or of any part thereof, a new or other lease, or new or other leases in lots.

(4.) A new or other lease may comprise additional land or mines and minerals, and may reserve any apportioned or other rent.

(5.) On a surrender, and the making of a new or other lease, whether for the same or for any extended or other term, and whether or not subject to the same or to any other covenants, provisions, or conditions, the value of the lessee's interest in the lease surrendered may be taken into account in the determination of the amount of the rent to be reserved, and of any fine to be taken, and of the nature of the covenants, provisions, and conditions to be inserted in the new or other lease.

(6.) Every new or other lease shall be in conformity with this Act.

Copyholds.

14.—(1.) A tenant for life may grant to a tenant of copyhold or customary land, parcel of a manor comprised in the settlement, a licence to make any such lease of that land, or of a specified part thereof, as the tenant for life is by this Act empowered to make of freehold land.

Power to grant to copy-holders licences for leasing.

(2.) The licence may fix the annual value whereon fines, fees, or other customary payments are to be assessed, or the amount of those fines, fees, or payments.

(3.) The licence shall be entered on the court rolls of the manor, of which entry a certificate in writing of the steward shall be sufficient evidence.

V.—SALES, LEASES, AND OTHER DISPOSITIONS.

Mansion and Park.

15. Notwithstanding anything in this Act, the principal mansion house on any settled land, and the demesnes thereof, and other lands

Restriction as to

A.D. 1882. usually occupied therewith, shall not be sold or leased by the tenant for life, without the consent of the trustees of the settlement, or an order of the Court,
 — mansion house, park, &c.

Streets and Open Spaces.

Dedication for streets, open spaces, &c. 16. On or in connexion with a sale or grant for building purposes, or a building lease, the tenant for life, for the general benefit of the residents on the settled land, or on any part thereof, —

- (i.) May cause or require any parts of the settled land to be appropriated and laid out for streets, roads, paths, squares, gardens, or other open spaces, for the use, gratuitously or on payment, of the public or of individuals, with sewers, drains, water-courses, fencing, paving, or other works necessary or proper in connexion therewith; and
- (ii.) May provide that the parts so appropriated shall be conveyed to or vested in the trustees of the settlement, or other trustees, or any company or public body, on trusts or subject to provisions for securing the continued appropriation thereof to the purposes aforesaid, and the continued repair or maintenance of streets and other places and works aforesaid, with or without provision for appointment of new trustees when required; and
- (iii.) May execute any general or other deed necessary or proper for giving effect to the provisions of this section (which deed may be inrolled in the Central Office of the Supreme Court of Judicature), and thereby declare the mode, terms, and conditions of the appropriation, and the manner in which and the persons by whom the benefit thereof is to be enjoyed, and the nature and extent of the privileges and conveniences granted.

Surface and Minerals apart.

Separate dealing with surface and minerals, with or without wayleaves, &c. 17.—(1.) A sale, exchange, partition, or mining lease, may be made either of land, with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers of working, wayleaves or rights of way, rights of water and drainage, and other powers, easements, rights, and privileges for or incident to or connected with mining purposes, in relation to the settled land, or any part thereof, or any other land.

(2.) An exchange or partition may be made subject to and in consideration of the reservation of an undivided share in mines or minerals.

VI.—INVESTMENT OR OTHER APPLICATION OF CAPITAL TRUST
MONEY.

A.D. 1882.

21. Capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorised object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes (namely):

Capital money under Act; investment, &c. by trustees or Court.

- (i.) In investment on Government securities, or on other securities on which the trustees of the settlement are by the settlement or by law authorised to invest trust money of the settlement, or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock, of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares, with power to vary the investment into or for any other such securities (e):
- (ii.) In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land-tax, rent-charge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land:
- (iii.) In payment for any improvement authorised by this Act:
- (iv.) In payment for equality of exchange or partition of settled land:
- (v.) In purchase of the seignory of any part of the settled land, being freehold land, or in purchase of the fee simple of any part of the settled land, being copyhold or customary land:
- (vi.) In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life:
- (vii.) In purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein, or in other land:
- (viii.) In purchase, either in fee simple, or for a term of sixty years or more, of mines and minerals convenient to be held or

(e) See now the Trustee Act, 1893, c. 53, ss. 1-9.

A.D. 1882.

worked with the settled land, or of any easement, right, or privilege convenient to be held with the settled land for mining or other purposes :

(ix.) In payment to any person becoming absolutely entitled or empowered to give an absolute discharge :

(x.) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions, of this Act :

(xi.) In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder.

Amend-
ment of
sec. 21 of
the Settled
Land Act,
1882.

[By the Settled Land Act, 1887, c. 30, s. 1, where any improvement of a kind authorised by the Act of 1882 has been or may be made either before or after the passing of this Act, and a rent-charge, whether temporary or perpetual, has been or may be created in pursuance of any Act of Parliament, with the object of paying off any moneys advanced for the purpose of defraying the expenses of such improvement, any capital money expended in redeeming such rent-charge, or otherwise providing for the payment thereof, shall be deemed to be applied in payment for an improvement authorised by the Act of 1882.

Section 28
of Settled
Land Act,
1882, to
apply to
improve-
ments
within
preceding
section.

2. Any improvement in payment for which capital money is applied or deemed to be applied under the provisions of the preceding section shall be deemed to be an improvement within the meaning of section twenty-eight of the Act of 1882, and the provisions of such last-mentioned section shall, so far as applicable, be deemed to apply to such improvement.]

VII.—IMPROVEMENTS.

Improvements with Capital Trust Money (f).

Descrip-
tion of
improve-
ments
authorised
by Act.

25. Improvements authorised by this Act are the making or execution on, or in connexion with, and for the benefit of settled land, of any of the following works, or of any works for any of the following purposes, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes (namely) :

(i.) Drainage, including the straightening, widening, or deepening of drains, streams, and watercourses :

(ii.) Irrigation ; warping :

(iii.) Drains, pipes, and machinery for supply and distribution of sewage as manure :

f) See S. L. Act, 1890, s. 13, p. 394.

- (iv.) Embanking or weiring from a river or lake, or from the sea, or A.D. 1882.
a tidal water :
- (v.) Groyne; sea walls ; defences against water :
- (vi.) Inclosing ; straightening of fences ; re-division of fields :
- (vii.) Reclamation ; dry warping :
- (viii.) Farm roads ; private roads ; roads or streets in villages or towns :
- (ix.) Clearing ; trenching ; planting :
- (x.) Cottages for labourers, farm-servants, and artisans, employed on the settled land or not (see p. 392) :
- (xi.) Farmhouses, offices, and out-buildings, and other buildings for farm purposes :
- (xii.) Saw mills, scutch mills, and other mills, water-wheels, engine-houses, and kilns, which will increase the value of the settled land for agricultural purposes or as woodland or otherwise :
- (xiii.) Reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs, sluices, and other works and machinery for supply and distribution of water for agricultural, manufacturing, or other purposes, or for domestic or other consumption :
- (xiv.) Tramways ; railways ; canals ; docks :
- (xv.) Jetties, piers, and landing places on rivers, lakes, the sea, or tidal waters, for facilitating transport of persons and of agricultural stock and produce, and of manure and other things required for agricultural purposes, and of minerals, and of things required for mining purposes :
- (xvi.) Markets and market-places :
- (xvii.) Streets, roads, paths, squares, gardens, or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connexion with the conversion of land into building land :
- (xviii.) Sewers, drains, watercourses, pipe-making, fencing, paving, brick-making, tile-making, and other works necessary or proper in connexion with any of the objects aforesaid :
- (xix.) Trial pits for mines, and other preliminary works necessary or proper in connexion with development of mines :
- (xx.) Reconstruction, enlargement, or improvement of any of those works.

26.—(1.) Where the tenant for life is desirous that capital money arising under this Act shall be applied in or towards payment for an improvement authorised by this Act, he may submit for approval to the

Approval
by Land
Commis-
sioners of

A.D.1882. trustees of the settlement, or to the Court, as the case may require, a scheme for the execution of the improvement, showing the proposed expenditure thereon.

—
scheme for
improvement
and
payment
thereon.

(2.) Where the capital money to be expended is in the hands of trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement, on—

(i.) A certificate of the Land Commissioners certifying that the work or operation, or some specified part thereof, has been properly executed, and what amount is properly payable by the trustees in respect thereof, which certificate shall be conclusive in favour of the trustees as an authority and discharge for any payment made by them in pursuance thereof; or on

(ii.) A like certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the Commissioners, or by the Court, which certificate shall be conclusive as aforesaid; or on

(iii.) An order of the Court directing or authorising the trustees to so apply a specified portion of the capital money.

(3.) Where the capital money to be expended is in Court, then, after a scheme is approved by the Court, the Court may, if it thinks fit, on a report or certificate of the Commissioners, or of a competent engineer or able practical surveyor, approved by the Court, or on such other evidence as the Court thinks sufficient, make such order and give such directions as it thinks fit for the application of that money, or any part thereof, in or towards payment for the whole or part of any work or operation comprised in the improvement.

Concur-
rence in
improve-
ments.

27. The tenant for life may join or concur with any other person interested in executing any improvement authorised by this Act, or in contributing to the cost thereof.

Obligation
on tenant
for life and
successors
to main-
tain, in-
sure, &c.

28.—(1.) The tenant for life, and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land, shall, during such period, if any, as the Land Commissioners by certificate in any case prescribe, maintain and repair, at his own expense, every improvement executed under the foregoing provisions of this Act, and where a building or work in its nature insurable against damage by fire is comprised in the improvement, shall insure and keep insured the same, at his own expense, in such amount, if any, as the Commissioners by certificate in any case prescribe.

(2.) The tenant for life, or any of his successors as aforesaid, shall not cut down or knowingly permit to be cut down, except in proper

thinning, any trees planted as an improvement under the foregoing A.D. 1882. provisions of this Act.

(3.) The tenant for life, and each of his successors as aforesaid, shall from time to time, if required by the Commissioners, on or without the suggestion of any person having, under the settlement, any estate or interest in the settled land in possession, remainder, or otherwise, report to the Commissioners the state of every improvement executed under this Act, and the fact and particulars of fire insurance, if any.

(4.) The Commissioners may vary any certificate made by them under this section, in such manner or to such extent as circumstances appear to them to require, but not so as to increase the liabilities of the tenant for life, or any of his successors as aforesaid.

(5.) If the tenant for life, or any of his successors as aforesaid, fails in any respect to comply with the requisitions of this section, or does any act in contravention thereof, any person having, under the settlement, any estate or interest in the settled land in possession, remainder, or reversion, shall have a right of action, in respect of that default or act, against the tenant for life; and the estate of the tenant for life, after his death, shall be liable to make good to the persons entitled under the settlement any damages occasioned by that default or act.

Execution and Repair of Improvements.

29. The tenant for life, and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land, and all persons employed by or under contract with the tenant for life, or any such successor, may from time to time enter on the settled land, and, without impeachment of w. by any remainderman or reversioner, thereon execute any improvement authorised by this Act, or inspect, maintain, and repair the same, and, for the purposes thereof, on the settled land, do, make, and use all acts, works, and conveniences proper for the execution, maintenance, repair, and use thereof, and get and work freestone, limestone, clay, sand, and other substances, and make tramways and other ways, and burn and make bricks, tiles, and other things, and cut down and use timber and other trees not planted or left standing for shelter or ornament.

Improvement of Land Act, 1864.

30. The enumeration of improvements contained in section nine of the Improvement of Land Act, 1864, is hereby extended so as to comprise, subject and according to the provisions of that Act, but only as regards applications made to the Land Commissioners after the commencement of this Act, all improvements authorised by this Act.

Protection
as regards
waste in
execution
and repair
of improve-
ments.

Extension
of 27 & 28
Vict. c.
114, s. 9.

A.D. 1882.

VIII.—CONTRACTS.

Power for
tenant for
life to enter
into con-
tracts.

31.—(1.) A tenant for life—

- (i.) May contract to make any sale, exchange, partition, mortgage, or charge; and
- (ii.) May vary or rescind, with or without consideration, the contract, in the like cases and manner in which, if he were absolute owner of the settled land, he might lawfully vary or rescind the same, but so that the contract as varied be in conformity with this Act; and any such consideration, if paid in money, shall be capital money arising under this Act; and
- (iii.) May contract to make any lease; and in making the lease may vary the terms, with or without consideration, but so that the lease be in conformity with this Act; and
- (iv.) May accept a surrender of a contract for a lease, in like manner and on the like terms in and on which he might accept a surrender of a lease; and thereupon may make a new or other contract, or new or other contracts, for or relative to a lease or leases, in like manner and on the like terms in and on which he might make a new or other lease, or new or other leases, where a lease had been granted; and
- (v.) May enter into a contract for or relating to the execution of any improvement authorised by this Act, and may vary or rescind the same; and
- (vi.) May, in any other case, enter into a contract to do any act for carrying into effect any of the purposes of this Act, and may vary or rescind the same.

(2.) Every contract shall be binding on and shall enure for the benefit of the settled land, and shall be enforceable against and by every successor in title for the time being of the tenant for life, and may be carried into effect by any such successor; but so that it may be varied or rescinded by any such successor, in the like case and manner, if any, as if it had been made by himself.

(3.) The Court may, on the application of the tenant for life, or of any such successor, or of any person interested in any contract, give directions respecting the enforcing, carrying into effect, varying, or rescinding thereof.

(4.) Any preliminary contract under this Act for or relating to a lease shall not form part of the title or evidence of the title of any person to the lease, or to the benefit thereof.

35.—(1.) Where a tenant for life is impeachable for w. in A D. 1882. respect of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an order of the Court, may cut and sell that timber, or any part thereof. Cutting
and sale of
timber and
part of
proceeds
to be set
aside.

(2.) Three fourth parts of the net proceeds of the sale shall be set aside as and be capital money arising under this Act, and the other fourth part shall go as rents and profits.

45.—(1.) A tenant for life, when intending to make a sale, exchange, partition, lease, mortgage, or charge, shall give notice of his intention in that behalf to each of the trustees of the settlement, by posting registered letters, containing the notice, addressed to the trustees, severally, each at his usual or last known place of abode in the United Kingdom, and shall give like notice to the solicitor for the trustees, if any such solicitor is known to the tenant for life, by posting a registered letter, containing the notice, addressed to the solicitor at his place of business in the United Kingdom, every letter under this section being posted not less than one month before the making by the tenant for life of the sale, exchange, partition, lease, mortgage, or charge, or of a contract for the same. Notice to
trustees.

(2.) Provided that at the date of notice given the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement.

(3.) A person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice as is required by this section.

(See Settled Land Act, 1884, s. 5.)

XII.—RESTRICTIONS, SAVINGS, AND GENERAL PROVISIONS.

50.—(1.) The powers under this Act of a tenant for life are not capable of assignment or release, and do not pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life, and remain exercisable by the tenant for life after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement. Powers not
assign-
able; con-
tract not
to exercise
powers
void.

(2.) A contract by a tenant for life not to exercise any of his powers under this Act is void.

(3.) But this section shall operate without prejudice to the rights of any person being an assignee for value of the estate or interest of the tenant for life; and in that case the assignee's rights shall not be affected without his consent, except that, unless the assignee is actually in possession of the settled land or part thereof, his consent shall not

A.D.1882. be requisite for the making of leases thereof by the tenant for life, provided the leases are made at the best rent that can reasonably be obtained, without fine, and in other respects are in conformity with this Act. (S. L. Act, 1890, s. 4, p. 393.)

(4.) This section extends to assignments made or coming into operation before or after and to acts done before or after the commencement of this Act; and in this section assignment includes assignment by way of mortgage, and any partial or qualified assignment and any charge or incumbrance; and assignee has a meaning corresponding with that of assignment.

Prohibition or limitation against exercise of powers, void.

51.—(1.) If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this Act a provision is inserted purporting or attempting, by way of direction, declaration, or otherwise, to forbid a tenant for life to exercise any power under this Act, or attempting, or tending, or intended, by a limitation, gift, or disposition over of settled land, or by a limitation, gift, or disposition of other real or any personal property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising, any power under this Act, that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void.

(2.) For the purposes of this section an estate or interest limited to continue so long only as a person abstains from exercising any power shall be and take effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power, discharged from liability to determination or cesser by or on his exercising the same.

Provision against forfeiture.

52. Notwithstanding anything in a settlement, the exercise by the tenant for life of any power under this Act shall not occasion a forfeiture.

Tenant for life trustee for all parties interested.

53. A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties.

General protection of purchasers, &c.

54. On a sale, exchange, partition, lease, mortgage, or charge, a purchaser, lessee, mortgagee, or other person dealing in good faith with a tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or

rent, as the case may require, that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of this Act.

55.—(1.) Powers and authorities conferred by this Act on a tenant for life or trustees or the Court or the Land Commissioners are exercisable from time to time.

Exercise of powers ; limitation of provisions, &c.

(2.) Where a power of sale, enfranchisement, exchange, partition, leasing, mortgaging, charging, or other power is exercised by a tenant for life, or by the trustees of a settlement, he and they may respectively execute, make, and do all deeds, instruments, and things necessary or proper in that behalf.

(3.) Where any provision in this Act refers to sale, purchase, exchange, partition, leasing, or other dealing, or to any power, consent, payment, receipt, deed, assurance, contract, expenses, act, or transaction, the same shall be construed to extend only (unless it is otherwise expressed) to sales, purchases, exchanges, partitions, leasings, dealings, powers, consents, payments, receipts, deeds, assurances, contracts, expenses, acts, and transactions under this Act.

56.—(1.) Nothing in this Act shall take away, abridge, or pre-judicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exercisable by a tenant for life, or by trustees with his consent, or on his request, or by his direction, or otherwise ; and the powers given by this Act are cumulative.

Saving for other powers.

(2.) But, in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail ; and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exercisable for any purpose provided for in this Act.

(3.) If a question arises, or a doubt is entertained, respecting any matter within this section, the Court may, on the application of the trustees of the settlement, or of the tenant for life, or of any other person interested, give its decision, opinion, advice, or directions thereon.

57.—(1.) Nothing in this Act shall preclude a settlor from conferring on the tenant for life, or the trustees of the settlement, any powers additional to or larger than those conferred by this Act.

Additional or larger powers by settlement.

(2.) Any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this Act, operate and be exercisable in the

A.D. 1882. like manner, and with all the like incidents, effects, and consequences, as if they were conferred by this Act, unless a contrary intention is expressed in the settlement.

XIII.—LIMITED OWNERS GENERALLY.

Enumera-
tion of
other
limited
owners, to
have
powers of
tenant for
life.

58.—(1.) Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act (namely):

- (i.) A tenant in tail, including a tenant in tail who is by Act of Parliament restrained from barring or defeating his estate tail, and although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown, but not including such a tenant in tail where the land in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services:
- (ii.) A tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event:
- (iii.) A person entitled to a base fee, although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown:
- (iv.) A tenant for years determinable on life, not holding merely under a lease at a rent:
- (v.) A tenant for the life of another, not holding merely under a lease at a rent:
- (vi.) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose:
- (vii.) A tenant in tail after possibility of issue extinct:
- (viii.) A tenant by the curtesy:
- (ix.) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event.

(2.) In every such case, the provisions of this Act referring to a A.D.1882 tenant for life, either as conferring powers on him or otherwise, and to a settlement, and to settled land, shall extend to each of the persons aforesaid, and to the instrument under which his estate or interest arises, and to the land therein comprised.

(3.) In any such case any reference in this Act to death as regards a tenant for life shall, where necessary, be deemed to refer to the determination by death or otherwise of such estate or interest as last aforesaid.

XIV.—INFANTS ; MARRIED WOMEN ; LUNATICS.

59. Where a person, who is in his own right seised of or entitled in possession to land, is an infant, then for purposes of this Act the land is settled land, and the infant shall be deemed tenant for life thereof. Infant absolutely entitled to be as tenant for life.

60. Where a tenant for life, or a person having the powers of a tenant for life under this Act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under this Act, the powers of a tenant for life under this Act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the Court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders. Tenant for life, infant.

61.—(1.) The foregoing provisions of this Act do not apply in the case of a married woman. Married woman, how to be affected.

(2.) Where a married woman who, if she had not been a married woman, would have been a tenant for life or would have had the powers of a tenant for life under the foregoing provisions of this Act, is entitled for her separate use, or is entitled under any statute, passed or to be passed, for her separate property, or as a feme sole, then she, without her husband, shall have the powers of a tenant for life under this Act.

(3.) Where she is entitled otherwise than as aforesaid, then she and her husband together shall have the powers of a tenant for life under this Act.

(4.) The provisions of this Act referring to a tenant for life and a settlement and settled land shall extend to the married woman without her husband, or to her and her husband together, as the case may require, and to the instrument under which her estate or interest arises, and to the land therein comprised.

A.D. 1882. (5.) The married woman may execute, make, and do all deeds, instruments, and things necessary or proper for giving effect to the provisions of this section.

(6.) A restraint on anticipation in the settlement shall not prevent the exercise by her of any power under this Act.

Tenant
for life,
lunatic.

62. Where a tenant for life, or a person having the powers of a tenant for life under this Act, is a lunatic, so found by inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Lord Chancellor, or other person intrusted by virtue of the Queen's Sign Manual with the care and commitment of the custody of the persons and estates of lunatics, exercise the powers of a tenant for life under this Act; and the order may be made on the petition of any person interested in the settled land, or of the committee of the estate.

XV.—SETTLEMENT BY WAY OF TRUSTS FOR SALE.

Provision
for case of
trust to sell
and re-
invest in
land.
(See S. L.
Act, 1884,
ss. 6, 7,
infra.)

63.—(1.) Any land, or any estate or interest in land, which under or by virtue of any deed, will, or agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act is subject to a trust or direction for sale of that land, estate, or interest, and for the application or disposal of the money to arise from the sale, or the income of that money, or the income of the land until sale, or any part of that money or income for the benefit of any person for his life, or any other limited period, or for the benefit of two or more persons concurrently for any limited period, and whether absolutely, or subject to a trust for accumulation of income for payment of debts or other purpose, or to any other restriction, shall be deemed to be settled land, and the instrument or instruments under which the trust arises shall be deemed to be a settlement; and the person for the time being beneficially entitled to the income of the land, estate, or interest aforesaid until sale, whether absolutely or subject as aforesaid, shall be deemed to be tenant for life thereof; or if two or more persons are so entitled concurrently, then those persons shall be deemed to constitute together the tenant for life thereof; and the persons, if any, who are for the time being under the settlement trustees for sale of the settled land, or having power of consent to, or approval of, or control over the sale, or if under the settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act are for purposes of this Act trustees of the settlement.

(2.) In every such case the provisions of this Act referring to a tenant for life, and to a settlement, and to settled land, shall extend to the person or persons aforesaid, and to the instrument or instruments under which his or their estate or interest arises, and to the land therein comprised, subject and except as in this section provided (that is to say):

- (i.) Any reference in this Act to the predecessors or successors in title of the tenant for life, or to the remaindermen, or reversioners or other persons interested in the settled land, shall be deemed to refer to the persons interested in succession or otherwise in the money to arise from sale of the land, or the income of that money, or the income of the land, until sale (as the case may require).
- (ii.) Capital money arising under this Act from the settled land shall not be applied in the purchase of land unless such application is authorised by the settlement in the case of capital money arising thereunder from sales or other dispositions of the settled land, but may, in addition to any other mode of application authorised by this Act, be applied in any mode in which capital money arising under the settlement from any such sale or other disposition is applicable thereunder, subject to any consent required or direction given by the settlement with respect to the application of trust money of the settlement. (See Trustee Act, 1893, c. 53, ss. 1-9.)
- (iii.) Capital money arising under this Act from the settled land and the securities in which the same is invested, shall not for any purpose of disposition, transmission, or devolution, be considered as land unless the same would, if arising under the settlement from a sale or disposition of the settled land, have been so considered, and the same shall be held in trust for and shall go to the same persons successively in the same manner, and for and on the same estates, interests, and trusts as the same would have gone and been held if arising under the settlement from a sale or disposition of the settled land, and the income of such capital money and securities shall be paid or applied accordingly.
- (iv.) Land of whatever tenure acquired under this Act by purchase, or in exchange, or on partition, shall be conveyed to and vested in the trustees of the settlement, on the trusts, and subject to the powers and provisions which, under the settlement or by reason of the exercise of any power of appointment or charging therein contained, are subsisting with respect to the settled land, or would be so subsisting if the

A.D. 1884.

same had not been sold, or as near thereto as circumstances permit, but so as not to increase or multiply charges or powers of charging.

SETTLED LAND ACT, 1884.

47 & 48 VICT. c. 18.

Fine on a
lease to be
capital
money.

4. A fine received on the grant of a lease under any power conferred by the Act of 1882 is to be deemed capital money arising under that Act.

Notice
under 45
& 46 Vict.
c. 38, s.
45, may,
as to a
sale, ex-
change,
partition,
or lease, be
general.

5.—(1.) The notice required by section forty-five of the Act of 1882 of intention to make a sale, exchange, partition, or lease may be notice of a general intention in that behalf.

(2.) The tenant for life is, upon request by a trustee of the settlement, to furnish to him such particulars and information as may reasonably be required by him from time to time with reference to sales, exchanges, partitions, or leases effected, or in progress, or immediately intended.

(3.) Any trustee, by writing under his hand, may waive notice either in any particular case, or generally, and may accept less than one month's notice.

(4.) This section applies to a notice given before, as well as to a notice given after, the passing of this Act.

(5.) Provided that a notice, to the sufficiency of which objection has been taken before the passing of this Act, is not made sufficient by virtue of this Act.

As to con-
sents of
tenants for
life.

6.—(1.) In the case of a settlement within the meaning of section sixty-three of the Act of 1882, any consent not required by the terms of the settlement is not by force of anything contained in that Act to be deemed necessary to enable the trustees of the settlement, or any other person, to execute any of the trusts or powers created by the settlement.

(2.) In the case of every other settlement, not within the meaning of section sixty-three of the Act of 1882, where two or more persons together constitute the tenant for life for the purposes of that Act, then, notwithstanding anything contained in sub-section (2) of section fifty-six of that Act, requiring the consent of all those persons, the consent of one only of those persons is by force of that section to be deemed necessary to the exercise by the trustees of the settlement, or by any other person, of any power conferred by the settlement exercisable for any purpose provided for in that Act.

(3.) This section applies to dealings before, as well as after, the A.D. 1884. passing of this Act.

7. With respect to the powers conferred by section sixty-three of the Act of 1882, the following provisions are to have effect :—

- (i.) Those powers are not to be exercised without the leave of the Court.
- (ii.) The Court may by order, in any case in which it thinks fit, give leave to exercise all or any of those powers, and the order is to name the person or persons to whom leave is given.
- (iii.) The Court may from time to time rescind, or vary, any order made under this section, or may make any new or further order.
- (iv.) So long as an order under this section is in force, neither the trustees of the settlement, nor any person other than a person having the leave, shall execute any trust or power created by the settlement, for any purpose for which leave is by the order given, to exercise a power conferred by the Act of 1882.
- (v.) An order under this section may be registered and re-registered, as a *lis pendens*, against the trustees of the settlement named in the order, describing them on the register as "Trustees for the purposes of the Settled Land Act, 1882."
- (vi.) Any person dealing with the trustees from time to time, or with any other person acting under the trusts or powers of the settlement, is not to be affected by an order under this section, unless and until the order is duly registered, and when necessary re-registered as a *lis pendens*.
- (vii.) An application to the Court under this section may be made by the tenant for life, or by the persons who together constitute the tenant for life, within the meaning of section sixty-three of the Act of 1882.
- (viii.) An application to rescind or vary an order, or to make any new or further order under this section, may be made also by the trustees of the settlement, or by any person beneficially interested under the settlement.
- (ix.) The person or persons to whom leave is given by an order under this section, shall be deemed the proper person or persons to exercise the powers conferred by section sixty-three of the Act of 1882, and shall have, and may exercise those powers accordingly.
- (x.) This section is not to affect any dealing which has taken place

Powers
given by s.
63 to be
exercised
only with
leave of
the Court.

A.D. 1884.

before the passing of this Act, under any trust or power to which this section applies.

Curtsey to be deemed to arise under settlement.

8. For the purposes of the Act of 1882 the estate of a tenant by the curtesy is to be deemed an estate arising under a settlement made by his wife.

A.D. 1885.

HOUSING OF THE WORKING CLASSES ACT, 1885.

48 & 49 VICT. c. 72.

S. 11.—(1.) The Settled Land Act, 1882, shall be amended as follows:

- (a.) Any sale, exchange, or lease of land in pursuance of the said Act, when made for the purpose of the erection on such land of dwellings for the working classes, may be made at such price, or for such consideration, or for such rent, as having regard to the said purpose, and to all the circumstances of the case, is the best that can be reasonably obtained, notwithstanding that a higher price, consideration, or rent might have been obtained if the land were sold, exchanged, or leased for another purpose.
- (b.) The improvements on which capital money may be expended, enumerated in section twenty-five of the said Act, and referred to in section thirty of the said Act, shall, in addition to cottages for labourers, farm servants, and artizans, whether employed on the settled land or not, include any dwellings available for the working classes, the building of which in the opinion of the Court is not injurious to the estate.

(2.) Any body corporate holding land may sell, exchange, or lease such land for the purpose of the erection of dwellings for the working classes at such price, or for such consideration, or for such rent, as having regard to the said purpose and to all the circumstances of the case, is the best that can reasonably be obtained, notwithstanding that a higher price, consideration, or rent might have been obtained if the land were sold, exchanged, or leased for another purpose.

By section eighteen of the Settled Land Act, 1890, the provisions of section eleven of the Housing of the Working Classes Act, 1885, and of any enactment which may be substituted therefor, shall have effect as if the expression "working classes" included all classes of persons who earn their livelihood by wages or salaries: Provided that this section shall apply only to buildings of a rateable value not exceeding one hundred pounds per annum.

A.D. 1890.

SETTLED LAND ACT, 1890.

53 & 54 VICT. c. 69.

Definitions.

4.—(1.) Every instrument whereby a tenant for life, in consideration of marriage or as part or by way of any family arrangement, not being a security for payment of money advanced, makes an assignment of or creates a charge upon his estate or interest under the settlement is to be deemed one of the instruments creating the settlement, and not an instrument vesting in any person any right as assignee for value within the meaning or operation of section fifty of the Act of 1882.

Instrument in consideration of marriage, &c. to be part of the settlement.

45 & 46
Vict. c. 38.

(2.) This section is to apply and have effect with respect to every disposition before as well as after the passing of this Act, unless inconsistent with the nature or terms of the disposition.

Completion of Contracts.

6. A tenant for life may make any conveyance which is necessary or proper for giving effect to a contract entered into by a predecessor in title, and which if made by such predecessor would have been valid as against his successors in title.

Power to complete predecessor's contract.

Leases.

7. A lease for a term not exceeding twenty-one years at the best rent that can be reasonably obtained without fine, and whereby the lessee is not exempted from punishment for w., may be made by a tenant for life—

Provision as to leases for 21 years.

- (i.) Without any notice of an intention to make the same having been given under section forty-five of the Act of 1882; and
- (ii.) Notwithstanding that there are no trustees of the settlement for the purposes of the Settled Land Acts, 1882 to 1890; and
- (iii.) By any writing under hand only containing an agreement instead of a covenant by the lessee for payment of rent in cases where the term does not extend beyond three years from the date of the writing.

45 & 46
Vict. c. 38.

8. In a mining lease—

- (i.) The rent may be made to vary according to the price of the minerals or substances gotten, or any of them :
- (ii.) Such price may be the saleable value, or the price or value appearing in any trade or market or other price list or return from time to time, or may be the marketable value as ascertained in any manner prescribed by the lease (including a reference to arbitration), or may be an average of any such prices or values taken during a specified period.

Provision as to mining leases.

A.D. 1890. **9.** Where, on a grant for building purposes by a tenant for life, the land is expressed to be conveyed in fee simple with or subject to a reservation thereof of a perpetual rent or rent-charge, the reservation shall operate to create a rent-charge in fee simple issuing out of the land conveyed, and having incidental thereto all powers and remedies for recovery thereof conferred by section forty-four of the Conveyancing and Law of Property Act, 1881, and the rent-charge so created shall go and remain to the uses on the trusts and subject to the powers and provisions which, immediately before the conveyance, were subsisting with respect to the land out of which it is reserved.

Power to reserve a rent-charge on a grant in fee simple.

44 & 45
Vict. c. 41.

Dealings as between Tenant for Life and the Estate.

Provision enabling dealings with tenant for life.

12. Where a sale of settled land is to be made to the tenant for life, or a purchase is to be made from him of land to be made subject to the limitations of the settlement, or an exchange is to be made with him of settled land for other land, or a partition is to be made with him of land an undivided share whereof is subject to the limitations of the settlement, the trustees of the settlement shall stand in the place of and represent the tenant for life, and shall, in addition to their powers as trustees, have all the powers of the tenant for life in reference to negotiating and completing the transaction.

Application of Capital Money.

Application of capital money.

13. Improvements authorised by the Act of 1882 shall include the following ; namely,
 (i.) Bridges ;
 (ii.) Making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let ;
 (iii.) Erection of buildings in substitution for buildings within an urban sanitary district taken by a local or other public authority, or for buildings taken under compulsory powers, but so that no more money be expended than the amount received for the buildings taken and the site thereof ;
 (iv.) The rebuilding of the principal mansion house on the settled land : Provided that the sum to be applied under this subsection shall not exceed one-half of the annual rental of the settled land.

14. All or any part of any capital money paid into Court may, if the Court thinks fit, be at any time paid out to the trustees of the settlement for the purposes of the Settled Land Acts, 1882 to 1890.

Capital money in Court may be paid out to trustees.

15. The Court may, in any case where it appears proper, make A.D. 1890. an order directing or authorising capital money to be applied in or towards payment for any improvement authorised by the Settled Land Acts, 1882 to 1890, notwithstanding that a scheme was not, before the execution of the improvement, submitted for approval, as required by the Act of 1882, to the trustees of the settlement or to the Court.

LIMITATION OF ACTIONS BILL (H.L. 39.)

A.D. 1894.

1. Every enactment in which any longer period than one year is fixed as the period of limitation for an action or other proceeding in respect of a civil wrong, other than a proceeding which raises any question as to the title to real estate, shall be construed as if, instead of that longer period, the period of one year had been fixed therein; and all enactments referring to any such enactment shall be construed accordingly.

Provided that if the wrong is not discovered, and could not with reasonable diligence have been discovered within the said period of one year, and the action or other proceeding in respect thereof is commenced within one year from the time when it could with reasonable diligence have been discovered, the existing period of limitation shall continue to apply.

2. This Act shall not extend to Scotland.

Extent of Act.

3. This Act shall apply only to actions or other proceedings commenced after the first day of January one thousand eight hundred and ninety-five, and shall not deprive any person of any right or defence to which he is on that day entitled under any existing Statute of Limitation.

Commencement of Act.

4. This Act may be cited as the Limitation Act, 1894.

Short title.

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